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In The
Supreme Court of the United States

THOMAS M. HODGSON, Individually
and as BRISTOL COUNTY SHERIFF,

Petitioner,

vs.

DAVID DAVIGNON; DAVID GOUVEIA;
DAVID MILLER; EDWARD MORRIS, JR;
AND THOMAS PRESBY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Must deference be given to prison administrators when reviewing an employee disciplinary decision for purposes of the test set forth in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968)?

2) When applying the test set forth in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968) must the potential disruption that could result from the employee's behavior be expressly considered?

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellant below):

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
CITATIONS FOR OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI	9
1. THE FIRST CIRCUIT'S RULING THAT PETITIONER WAS NOT ENTITLED TO DEFERENCE WHEN APPLYING THE *PICKERING* BALANCING TEST CONFLICTS WITH HOLDINGS IN THE SEVENTH AND EIGHTH CIRCUITS	12
2. PUBLIC POLICY REQUIRES A CLEAR RULING BY THIS COURT THAT A PUBLIC SAFETY OFFICIAL NEED NOT AWAIT ACTUAL DISRUPTION BEFORE REGULATING SPEECH IN THE WORKPLACE	16
CONCLUSION	19

TABLE OF CONTENTS – Continued

		Page
Appendix A:	Opinion of the Court of Appeals, filed April 24, 2008, *Davignon, et al. v. Hodgson,* 524 F.3d 91 (1st Cir. 2008)	App. 1
Appendix B:	Errata Sheet to Opinion of the Court of Appeals, entered May 15, 2008, *Davignon, et al. v. Hodgson,* 524 F.3d 91 (1st Cir. 2008)	App. 50
Appendix C:	Errata Sheet to Opinion of the Court of Appeals, entered June 30, 2008, *Davignon, et al. v. Hodgson,* 524 F.3d 91 (1st Cir. 2008)	App. 52
Appendix D:	Judgment of the Court of Appeals, filed April 24, 2008, *Davignon, et al. v. Hodgson*, 524 F.3d 91 (1st Cir. 2008)	App. 54
Appendix E:	Amended Judgment in a Civil Case, regarding plaintiff David Davignon filed February 24, 2006, Lasker, S.D.J. *Davignon, et al. v. Hodgson,* U.S.D.C., C.A. No. 01-10615-MEL	App. 56
Appendix F:	Amended Judgment in a Civil Case, regarding plaintiff David Gouveia filed February 24, 2006, Lasker, S.D.J. *Davignon, et al. v. Hodgson,* U.S.D.C., C.A. No. 01-10615-MEL	App. 58

TABLE OF CONTENTS – Continued

Page

Appendix G: Amended Judgment in a Civil Case, regarding plaintiff David Miller filed February 24, 2006, Lasker, S.D.J. *Davignon, et al. v. Hodgson,* U.S.D.C., C.A. No. 01-10615-MEL ..... App. 60

Appendix H: Amended Judgment in a Civil Case, regarding plaintiff Edward Morris filed February 24, 2006, Lasker, S.D.J. *Davignon, et al. v. Hodgson,* U.S.D.C., C.A. No. 01-10615-MEL ..... App. 62

Appendix I: Memorandum and Order, filed February 22, 2006, Lasker, S.D.J. *Davignon, et al. v. Hodgson,* U.S.D.C., C.A. No. 01-10615-MEL ..... App. 64

Appendix J: Judgment in a Civil Case, regarding plaintiff Thomas Presby filed November 21, 2005, Lasker, S.D.J. *Davignon, et al. v. Hodgson,* U.S.D.C., C.A. No. 01-10615-MEL ..... App. 66

Appendix K: Order of the Court of Appeals (denying rehearing and rehearing *en banc*), filed June 30, 2008, *Davignon, et al. v. Hodgson,* 524 F.3d 91 (1st Cir. 2008) ..... App. 68

TABLE OF AUTHORITIES

Page

CASES

Brauer v. Hart, 909 F.2d 1035 (7th Cir. 1990).....17

Connick v. Myers, 461 U.S. 138 (1983) 11, 12

Devaney v. Hall, 509 F. Supp. 497 (D. Mass. 1981).....13

Dill v. City of Edmond, 155 F.3d 1193 (10th Cir. 1998).....17

Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978).....14

Germann v. City of Kansas, 776 F.2d 761 (8th Cir. 1985).....14

Hughes v. Whitmer, 714 F.2d 1407 (8th Cir. 1983).....14

Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17 (2d Cir. 1979).....14

Jones v. North Carolina Prisoners Labor Union, Inc., 433 U.S. 119 (1977).....12, 13

Joyner v. Lancaster, 815 F.2d 20 (4th Cir. 1987).....17

Mitchell Shands, et al. v. City of Kennett, et al., 993 F.2d 1337 (8th Cir. 1993) 10, 11, 13, 14, 15

Norval Williams v. Rick Seniff, et al., 342 F.3d 774 (7th Cir. 2003) 10, 11, 15, 17

Peter A. Kokkinis v. Vladimir Ivkovich, et al., 185 F.3d 840 (7th Cir. 1999) 10, 11, 15

Pickering v. Bd. of Education, 391 U.S. 563 (1968).....7, 12, 16

TABLE OF AUTHORITIES – Continued

Page

Procunier v. Martinez, 416 U.S. 396 (1974) 12

Tyler v. City of Mountain Home, 72 F.3d 568 (8th Cir. 1995) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment 2, 12, 13

Fourteenth Amendment (Section 1) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 9

28 U.S.C. § 1343(a) 9

42 U.S.C. § 1291 9

42 U.S.C. § 1983 ..... 1, 3, 7

CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 524 F.3d 91 (1st Cir. 2008). The judgments and accompanying memorandum and order for a permanent injunction entered by the District Court (Appendix E-J) and the order of the Court of Appeals denying the petition for rehearing and hearing *en banc* (Appendix K) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on April 24, 2008 and issued errata sheets on May 15, 2008 and June 30, 2008. That Court denied the petitioner's petition for rehearing and rehearing *en banc* on June 30, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to 42 U.S.C. § 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or

> other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The respondents allege that the petitioner violated their rights under the First and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

> ***First Amendment:*** "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> ***Fourteenth Amendment (Section 1):*** "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was brought by five individuals, all of whom were correction officers employed by Bristol County, Massachusetts and members of the Massachusetts Correction Officers Federated Union ("MCOFU"). (Record Appendix, Volume I at page 1 ("Rec. App.")). The Complaint alleged that each of the plaintiffs was suspended by petitioner Sheriff Hodgson on the basis of charges which, plaintiffs claimed, were imposed to retaliate against them for their association with the union. Plaintiffs alleged, *inter alia*, that these actions violated their rights under the First and Fourteenth Amendments and sought relief pursuant to 42 U.S.C. § 1983 and under state law. (Rec. App. I at 25-31). The matter was tried before a jury for nine days. (Rec. App. I at 13-14).

The verdicts were mixed, but the jury found in favor of the plaintiffs and against petitioner in his official capacity pursuant to 42 U.S.C. § 1983. (Rec. App. I at 14-15; Rec. App. II at 585-590). Plaintiffs subsequently filed motions for a permanent injunction and for attorneys' fees, which were opposed by petitioner but allowed by the Court.

This case arises out of events that took place in the fall of 2000. At that time, plaintiffs Davignon, Miller, Gouveia, Morris and Presby were correction officers employed by the Bristol County Sheriff's Office ("BCSO") and assigned to either the Ash Street jail facility in New Bedford, Massachusetts or the House of Correction in North Dartmouth, Massachusetts. (Rec. App. I at 160, 161, 162, 186, 207, 210, 245, 256). Four of the plaintiffs were union stewards for MCOFU, which was in negotiations with the BCSO involving a collective bargaining agreement, which had expired on June 30, 2000. (Rec. App. I at 161; Rec. App. II at 454; Defendant's Trial Exhibit ("Def. Ex.") 2).

The BCSO had instituted regulations and workplace directives: prohibiting correction officers from engaging in non-work related business while on duty; prohibiting distracting or harassing other employees from performing their jobs; and further prohibiting them from using department telephones for non-work related purposes. (*See* Def. Ex. 1 [Duties and Responsibilities of Correction Officers]; Def. Ex. 14 at 78 [1999 Directive regarding use of communication equipment]; Def. Ex. 20 at 101 [103 CMR 910.09, Code of Ethics/Employee Conduct and Work Rules]). Sheriff Hodgson testified that his principal concern was that inattention caused by officers conducting non-work related business while on duty creates potential for a security breach in a prison setting where security is of the utmost importance, and the safety of the officers, inmates and the general public

can be at immediate risk. (*See* Rec. App. I at 295, 312, 318-319).

BCSO officers are not authorized by the governing rules of conduct, or by the collective bargaining agreement, to conduct union business on County time without obtaining authorization. (Rec. App. II at 341). However, correction officers are free to discuss union business when they are not on duty or on County time; i.e., before or after work or outside of the prison facility. (Rec. App. II at 333, 495).

In early November 2000, Sheriff Hodgson received complaints that certain officers were soliciting and/or harassing other officers while on duty in an effort to gain their attendance at an informational union picket. (Rec. App. I at 188; Plaintiffs' Trial Exhibit ("Pl. Ex.") 13). Specifically, Sheriff Hodgson received complaints that three of the respondents were soliciting for the picket while on duty at the North Dartmouth House of Corrections. One officer complained to Sheriff Hodgson that he was being questioned about attendance at the picket while working, that he felt pressured and was not interested in participating in the picket. (Rec. App. I at 277; Rec. App. II at 299; 305, 307-308; Ex. 10D). Several other correction officers, all MCOFU members, also came forward and reported to the Chief of Staff that they were being harassed while on duty by calls from one of the Plaintiffs to participate in an organized union picket. (Rec. App. II at 452; 492-493). The Chief of Staff brought this to the Sheriff's attention. (Rec. App. I at 299; Rec. App. II at 452, 491).

Following these complaints, Sheriff Hodgson turned the matter over to the Internal Affairs Division of the BCSO. (Rec. App. II at 453).

After conducting interviews with affected corrections officers, Internal Affairs determined that on various occasions between November 13 and 17, 2000, three of the respondents, while on duty, had solicited correctional officers' participation in the scheduled picket. After Internal Affairs completed the investigation, legal counsel reviewed the results to determine the appropriate discipline. (Rec. App. II at 453). Based on these three officers' violations of departmental policies, each was suspended without pay for between six and nine weeks. (*See* Pl. Exs. 2A-2C). Sheriff Hodgson approved the sanctions after discussing legal counsel's recommendations (Rec. App. I at 302-303), as he believed "this was clearly a violation of a contract, as well as our work rules, and that it was premeditated, planned, that the officers knowingly had done this." (Rec. App. II at 453; *see also id.* at 461). He testified that he felt that the officers had breached the security of the institution and that they easily could have approached other officers about the picket outside of the workplace. (Rec. App. II at 458). He further testified that he had no motivation to retaliate against the five plaintiffs at the time of these events. (*Id.*)

The two remaining plaintiffs were not implicated in the solicitations described above. They were disciplined by their supervisor for leaving the doors unlocked at the Ash Street facility. Specifically, on

September 15, 2000, Presby and Morris were on duty at the Ash Street facility when the Assistant Deputy Superintendent for Logistics, entered the facility and found both the main entrance and inner vestibule doors unlocked. He then found two more inner doors unlocked. (*Id.*) (*See also* Def. Ex. 23). The post orders (description of duties) for central control stated: "you shall NEVER allow more than one door to the gate to open without proper authorization from the Assistant Deputy Superintendent of security or the watch Commander." (Rec. App. II at 376-377; Def. Ex. 25). Notwithstanding this, those two plaintiffs contend that the reason for their discipline was pretextual and in retaliation for their union involvement.

At the close of evidence, the trial judge determined that the balancing test set forth in *Pickering v. Bd. of Education*, 391 U.S. 563 (1968) was controlling on the § 1983 claims. He then made specific rulings that the plaintiffs' "demonstrated that their speech related to a matter of public concern" and also that the employees' right to engage in the challenged behavior outweighed the employer's interest in regulating it. (Rec. App. II at 117 and 138-39).

The trial judge determined, however, that he would nonetheless put the "balancing" question to the jury. (*Id.*) Accordingly, petitioner asked for the following instructions which the trial court declined to give:

> 1. A court deciding whether a government employee's speech was a matter of public concern must defer to the employer's view

> of the underlying facts so long as that view is facially reasonable and drawn in good faith. (citations omitted)
>
> 2. In addition, judicial review of prison officials' actions, especially those taken to preserve institutional security, is very limited. Courts reviewing the administration of prisons and jails must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." Even absent the special deference given to prison administrators, potential disruptiveness can outweigh the employee's free speech interests. (citations omitted)

(Appendix A at 32, Rec. App. II at 533, 542-43).

In rejecting these instructions, the trial judge stated his belief that the "deference" rule did not apply to employment decisions but only to "relations between the Sheriff or the correctional officer and the prisoners." (Rec. App. II at 533). The trial judge similarly declined to give the requested instruction regarding potential disruption. (Rec. App. II at 533). Instead, he determined that in order to find in favor of the petitioner "you must find that the Sheriff has proffered sufficient evidence that the officers' speech adversely impacted or disrupted the Department." (Rec. App. II at 527, 533).

The Court of Appeals for the First Circuit affirmed the judgments of the District Court in a

published opinion filed on April 24, 2008 (Appendix A). That Court later issued errata sheets to the issued opinion on May 15, 2008 and June 30, 2008 (Appendix B and C). The petitioner's request for rehearing and rehearing *en banc* was denied on June 30, 2008 (Appendix K).

The District Court's subject matter jurisdiction in this case was based on 28 U.S.C. § 1331 (granting the District Court's original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States) and § 1343(a) (granting the District Court's original jurisdiction of any civil action authorized by law to be commenced by any person, *inter alia*, "(3) to redress the deprivation under color of any state law, statute . . . of any right, privilege or immunity secured by the Constitution of the United States; and (4) to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." The basis for the jurisdiction of the Court of Appeals was 42 U.S.C. § 1291 (granting the courts of appeals jurisdiction of appeals from all final decisions of the district courts of the United States).

REASONS FOR GRANTING CERTIORARI

This case involves important public policy principles regarding the rights of Sheriffs and other corrections administrators to exercise discretion in the promulgation and enforcement of work rules to

maintain safety and security within the dangerous and potentially explosive confines of correctional facilities. Such officials must be able to do so without undue concern or threat that liability will later be imposed on them for purported violations of government employees' rights to engage in union or other speech related activities while on duty. In this case, the constitutionally protected activities are rights under the First Amendment to engage in, and solicit other correction officers to participate in, union activity *while on duty* within the confines of a prison facility. As well, this case has broad implications not only for the orderly management and public safety of correctional facilities, but also for other state and county law enforcement agencies where such critical interests exist. Other circuits have analyzed these issues in the context of prisons and other analogous settings, and their decisions provide substantial precedent.

Decisions of both the Seventh and Eighth Circuits in *Peter A. Kokkinis v. Vladimir Ivkovich, et al.*, 185 F.3d 840 (7th Cir. 1999), *Norval Williams v. Rick Seniff, et al.*, 342 F.3d 774 (7th Cir. 2003), and *Mitchell Shands, et al. v. City of Kennett, et al.*, 993 F.2d 1337 (8th Cir. 1993) support the petitioner's position. In *Shands*, the Court held that a fire chief's "decision to discharge plaintiffs is entitled to judicial deference on two levels. First, the determination that the four firemen's speech would cause dissention and disruption is entitled to considerable judicial deference. Second, his response to the actual or perceived

disruption – the discharge of the men – is likewise entitled to deference." *Shands* at 1345 (citations omitted). In *Kokkinis*, the Seventh Circuit stated that "the public safety employer's determinations of both potential for disruption as a result of the speech, as well as the employer's response to the actual or perceived disruption, are entitled to 'considerable judicial deference.'" *Kokkinis* at 845-46, citing *Shands*. In *Williams*, the Seventh Circuit reiterated its holding in *Kokkinis*. *Williams* at 783.

The well recognized need of correction officials to preserve order and authority in prison settings, as well as the judicially recognized heightened interest of law enforcement and other public safety agencies in regulating the speech and activities of its employees, combine to make the issue of deference to a public employer's decisions in regulating speech in the context of a public safety organization, such as a sheriff's office, one of exceptional importance. As well, this Court's own decision in *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) supports petitioner's position that a prison administrator need not await the potentially disastrous consequences of actual disruption within the facility, but may instead take action to regulate union related activity by employees while on duty based on the official's judgment as to the potential for disruption. The importance of these issues and this case was recognized by both the National Sheriff's Association, representing sheriffs across the United States, and the Massachusetts Sheriff's Association, representing all sheriffs in the

Commonwealth of Massachusetts, when they filed *amici* briefs in support of petitioner in the First Circuit Court of Appeals.

1. THE FIRST CIRCUIT'S RULING THAT PETITIONER WAS NOT ENTITLED TO DEFERENCE WHEN APPLYING THE *PICKERING* BALANCING TEST CONFLICTS WITH HOLDINGS IN THE SEVENTH AND EIGHTH CIRCUITS

When applying the *Pickering* balancing test in First Amendment public employee retaliation cases, this Court long ago recognized that "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick v. Myers,* 461 U.S. 138, 151-152. This Court has also recognized more generally that:

> Courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Jones v. North Carolina Prisoners Labor Union, Inc., 433 U.S. 119, 126 (1977), citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974).

Prior to its decision in this case, the First Circuit had not addressed how these principles apply to review of a correction or other public safety official's judgments concerning the regulation of speech, when raised in the context of a public employee's First Amendment claim. Considering this issue as a matter of first impression, the First Circuit held that:

> There was no error in refusing to issue Hodgson's requested instructions. With respect to the requested "deference instruction," Hodgson does not cite any precedent suggesting that courts should give special deference to *employment* decisions made by correction officials. Rather the cited cases involve correction officials making decisions affecting inmates. *See, e.g., Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119 (1977) (operation of prisoners' union); *Devaney v. Hall*, 509 F. Supp. 497 (D. Mass. 1981) (former inmate's complaint against officers and employees of department of corrections). The requested jury instruction was therefore not required as a mater of substantive law.

(Appendix A at 33).

Both the Seventh and Eighth Circuits have long recognized the importance of this "deference" concept in public employee First Amendment cases involving public safety organizations. *Shands, supra,* was decided by the Eighth Circuit in 1993, when four firefighters alleged that they had been discharged in retaliation for exercising First Amendment rights to free speech after making statements at a City Council

meeting. In reviewing the trial court's grant of a judgment notwithstanding the verdict, the Eighth Circuit noted that:

> As a public safety organization, a fire department, like a police department, has a more significant interest than the typical government employer in regulating the speech activities of its employees in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence' in its ability. *Hughes [v. Whitmer]*, 714 F.2d [1407] at 1419 [8th Cir. 1983] (quoting *Gasparinetti v. Kerr*, 568 F.2d 311, 315-16 (3d Cir. 1977)), *cert. denied*, 436 U.S. 903, 98 S.Ct. 2232, 56 L.Ed.2d 401 (1978)). *Cf. Germann*[*v. City of Kansas*], 776 F.2d [761] at 765 [(8th Cir. 1985)] (holding that a fire captain's speech was not protected). 'When lives may be at stake in a fire, an esprit de corps is essential to the success of the joint endeavor.' *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F.2d 17, 26 (2d Cir. 1979).

Shands, at 1344-1345.

> The Court then went on to hold that the fire officials' "decision to discharge plaintiffs is entitled to judicial deference on two levels. First is the determination that the four firemen's speech had caused or would cause dissension and disruption is entitled to considerable judicial deference. Second, his response to the actual perceived disruption –

> the discharge of the men – is likewise entitled to deference."

Id. at 1345.

Similarly, citing *Shands*, the Seventh Circuit held in *Kokkinis*, where a police officer alleged that he was retaliated against for making statements about a police chief on television, that "the public safety employer's determinations of both the potential for disruption as a result of the speech, as well as the employer's response to the actual perceived disruption, are entitled to 'considerable judicial deference.'" *Kokkinis*, at 845-46, citing *Shands*.

As recently as 2003, the Seventh Circuit reiterated this deference standard in *Williams*. In that case, the Seventh Circuit reviewed a grant of summary judgment in favor of the employer of a discharged police officer who questioned the guilt of an individual convicted of killing a police officer. In so doing, and affirming the judgment in favor of defendants, the Court again noted that "deference to the employer's judgment regarding the disruptive nature of an employee's speech is especially important in the context of law enforcement." *Williams*, at 783, citing *Kokkinis* at 843.

In an errata sheet issued on June 30, 2008, the First Circuit added a footnote to its opinion in this case, acknowledging the cases relied on by petitioner but stating that they applied to judicial deference only, and not when instructing a jury. (Appendix C). However, this overlooks the fact that the trial judge

also made an express finding as to the balancing of the affected interests under *Pickering* and clearly rejected petitioner's suggestion of deference when doing so. (Rec. App. II at 533). Moreover, however decided, the issue of deference to a prison administrator's employment decisions remains one of critical importance. Yet, both the trial court and the First Circuit rejected the deference concepts adopted by the Seventh and Eighth Circuits and advanced by petitioner.

In light of these principles and rulings, and especially those addressing the deference issue in the context of public safety employers issued by the Seventh and Eighth Circuit, petitioner submits that the First Circuit Court of Appeals decision affirming the District Court's refusal to afford deference to the decision of petitioner Sheriff Hodgson in regulating workplace speech and behavior, as both a correction administrator and a public safety official, requires review by this Court.

2. PUBLIC POLICY REQUIRES A CLEAR RULING BY THIS COURT THAT A PUBLIC SAFETY OFFICIAL NEED NOT AWAIT ACTUAL DISRUPTION BEFORE REGULATING SPEECH IN THE WORKPLACE

Several Circuit Courts of Appeal have recognized the unique nature of law enforcement agencies and the necessity of maintaining order and discipline within them. Law enforcement agencies, such as

sheriff's offices, are paramilitary organizations and respect for the chain-of-command is critical to accomplishing the entity's mission of maintaining order and public safety. *Williams v. Seniff*, 342 F.3d 774, 784 (7th Cir. 2003); *Dill v. City of Edmond*, 155 F.3d 1193, 1203 (10th Cir. 1998); *Tyler v. City of Mountain Home*, 72 F.3d 568, 570 (8th Cir. 1995). This paramilitary structure requires that law enforcement agencies receive greater latitude in disciplining employees than some other public entities, such as universities, should receive. *Tyler*, 72 F.3d at 570 (commenting that paramilitary character and mission of police departments results in greater latitude in discipline and personnel matters than normal government employers); *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987) ("employees can be arrayed on a spectrum from university professors at one end to policemen at the other end. State inhibition of academic freedom is strongly disfavored. . . . In polar contrast is the discipline demand of, and freedom correspondingly denied to[,] policemen.")

> There is a particularly urgent need for close teamwork among those involved in the "high stakes" field of law enforcement. Speech that might not interfere with work in an environment less dependent on order, discipline, and *esprit de corps* could be debilitating to a police force. Such considerations are permissible in weighing constitutional violations.

Brauer v. Hart, 909 F.2d 1035, 1041 (7th Cir. 1990).

While not rejecting these substantive principals outright, the First Circuit found no error on the part of the District Court when it instructed the jury that in order to find for the petitioner it must "find that the Sheriff has proffered sufficient evidence that the officers' speech adversely impacted or disrupted the department." (App. Rec. II at 527). In spite of this explicit requirement on the part of the District Court that the petitioner prove actual adverse disruption, and its rejection of petitioner's request for an instruction that the Sheriff could act to prevent potential disruption, the First Circuit held that the requested instruction regarding potential disruption "was substantially incorporated into the charge to the jury." (Appendix A at 33).

The standard adopted by the District Court and affirmed by the First Circuit: fails to recognize the important policy considerations associated with workplace speech and behavior within the confines of a prison (or in the ranks of other law enforcement agencies); conflicts with the express rulings of other circuits, including the Seventh and Eighth Circuits; and warrants review by this Court.

The ramifications are far beyond the facts of this case – sheriffs and other law enforcement officials are responsible for the safety of their employees, prisoners in their custody and ultimately, the public as a whole. When making workplace decisions, such officials must know with certainty that they may make decisions based on their professional judgment without first having to wait for possibly tragic consequences to actually unfold. Indeed, the importance of

these issues to sheriffs across the country is demonstrated by the fact that both the Massachusetts Sheriffs Association (representing the sheriffs in Massachusetts) and the National Sheriffs Association (representing sheriffs across the United States) filed *amici* briefs in support of the petitioner in the First Circuit Court of Appeals.

CONCLUSION

The decision of the First Circuit has unreasonably exposed sheriffs and other law enforcement officials to liability for administrative decisions regulating speech and behavior within work environments, including prisons, where discipline and cooperation are essential. This will likely have a chilling effect on decision making by public safety officials and consequently, poses a risk of harm to prisoners, correction officers, and the public. Only this Court can address and ameliorate that risk.

DATED: September 29, 2008

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 06-1191

DAVID DAVIGNON, DAVID GOUVEIA,
DAVID MILLER, EDWARD MORIS, JR.,
and THOMAS PRESBY,

Plaintiffs, Appellees,

v.

THOMAS M. HODGSON,
Individually and as Bristol County Sheriff,

Defendant, Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Morris E. Lasker,*
Senior U.S. District Judge]

Before

Torruella, *Circuit Judge*,

Stahl, *Senior Circuit Judge*,

and Howard, *Circuit Judge*.

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* Of the Southern District of New York, sitting by designation.

Bruce A. Assad, Bristol County Sheriff's Office, with whom *Gary W. Smith*, *Susan S. Riedel*, and *Posternak Blankstein & Lund LLP*, were on brief, for appellant.

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Jeffrey R. Turco and *Brian Knuuttila*, on brief for amicus curiae Massachusetts Sheriffs' Association.

Douglas I. Louison, *Stephen C. Pfaff*, and *Merrick, Louison & Costello, LLP*, on brief for amicus curiae Massachusetts Correctional Officers Federated Union.

Fredric M. Knapp, *Richard Weintraub*, *James T. Prusinowski*, and *Laufer, Knapp, Torzewski, Dalena & Sposaro, LLC*, on brief for amicus curiae National Sheriff's Association.

April 24, 2008

HOWARD, *Circuit Judge.* Five Bristol County Massachusetts correctional officers were suspended from their jobs by Sheriff Thomas Hodgson. Claiming that the sheriff's actions were in retaliation for their First Amendment activities, they sued pursuant to 42 U.S.C. § 1983, in addition to bringing various claims under state law. A jury found Hodgson liable in his official capacity on the § 1983 claims, found against

him on some of the state law claims, and awarded a total of $17,980 in compensatory damages. In this appeal, we reject each of Hodgson's claims of error and affirm the judgment.

I. Facts

We rehearse the facts in a light most favorable to the jury verdict. *See McDonough* v. *City of Quincy*, 452 F.3d 8, 13 (1st Cir. 2006).

In 2000, the Sheriff's Department employed 350 correctional officers, all of whom were members of the Massachusetts Correctional Officers Federated Union (the "union"). Among the correctional facilities operated by the Department were the Ash Street jail in New Bedford and the House of Correction in North Dartmouth. Four of the plaintiffs worked at the Ash Street facility; plaintiff David Davignon worked at the House of Correction.

All five of the plaintiffs were active in union affairs. Plaintiffs Davignon, David Gouveia, David Miller and Thomas Presby were union stewards, and counted among their union duties looking into management's alleged violations of the collective bargaining agreement. Davignon and Presby were also members of the union's negotiating subcommittee, as was plaintiff Edward Morris, Jr.

In the spring of 2000, with their collective bargaining agreement set to expire in June, the union and the Department began negotiating a new agreement.

Hodgson, who as sheriff was in charge of the correctional facilities, was among those representing the Department at these negotiations.

The jury heard testimony that, by the summer of 2000, negotiations had grown tense, after no progress on a new agreement had been made after several sessions. Davignon testified that union negotiators had trouble getting release time from work to attend the sessions. At one session in late June, tensions boiled over. According to testimony, Hodgson had arrived more than thirty minutes late, and at the close of the session a union representative asked him to be punctual for the next meeting. Witnesses said that Hodgson cursed at the representative, slammed his hand on the table and said, "I'm the Sheriff. If you have to wait, you'll wait for me." Both Davignon and Presby were present, in their capacities as union negotiators.

In time, the union requested mediation. In September, after returning from the first mediation session, Presby requested and received permission from superior officers to address fellow officers at roll call. There was testimony that presentation of information unrelated to the facility's daily operations was not unusual at roll calls, including giving updates on union activity. Presby reported that the negotiation sessions had not been going well and that the union planned to hold a meeting to determine its next step.

Presby's update became the subject of an internal investigation ordered by Hodgson, to determine

whether Presby had left his post in order to give the report. A few days after Presby's remarks, Hodgson also ordered an additional investigation into whether Presby and Morris had left open a door to the central control area of the Ash Street jail. Hodgson testified that he initiated this latter investigation because an administrator told him that on a visit to the facility eleven days prior, the administrator had walked through a number of unlocked doors including a door to central control. The administrator identified Morris and Presby among the officers present in the central control area. He did not, however, submit a written report on the date of the incident as called for by standard departmental procedure. While these investigations were underway, Hodgson issued a policy directive stressing that union representatives could not use roll call to discuss union business.

The union decided to hold a picket at a busy intersection near the Ash Street facility to express dissatisfaction with the contract negotiations and to criticize Hodgson's treatment of correctional officers and their families. The union mailed a letter to its members providing relevant information, and Davignon, Gouveia and Miller spoke with individual correctional officers at work about the planned picket.

At trial, conversations between plaintiffs and four officers were highlighted. There was no dispute that the conversations were brief, with estimates ranging from approximately ten to forty-five seconds. Testimony conflicted as to the precise nature of Gouveia's and Davignon's conversations. Gouveia said

that he relayed information about the picket to two officers, but there was also testimony that he asked them if they were going to attend the picket. One noted that Gouveia held a pen and paper during the encounter. Further, although Gouveia testified that several officers approached him and asked him about the picket, the only officers that reported Gouveia spoke to them said that he did the approaching. One officer asserted that Davignon contacted him by telephone and asked him if he would be attending the picket. Davignon denied doing so both in investigative interviews and at trial.

Neither the plaintiffs nor the officers with whom they spoke testified that the conversations distracted any of them from their work, or otherwise endangered staff or inmates. The officer allegedly contacted by phone did, however, testify that "in a sense" he was taken away from his post to answer Davignon's phone call.

Hodgson ordered an investigation into these encounters, to determine whether officers had been pressured or coerced to participate in the picket. Hodgson testified that he initiated the investigation because one of the officers had mentioned to him that he felt that he was being harassed about the picket.

During this time Hodgson addressed three roll calls. In one or more of them he referred to the Supreme Court's decision in *Garrity* v. *New Jersey,*[1] and several witnesses testified that Hodgson told officers that, based on *Garrity*, he could terminate those who failed to be completely truthful during internal affairs investigations. He also stated that employees could not conduct union business on duty, and further that he knew there were "troublemakers" in the department whom he would not hesitate to remove. Relatedly, he stressed that if they were terminated they might grieve and eventually get their jobs back, but they would be making five or six dollars an hour in the interim. Both Gouveia and Davignon testified that Hodgson stared directly at them when making the "troublemakers" comment.

Hodgson also discussed the status of the collective bargaining negotiations. He told the officers that the election was over, he was the sheriff, and that the longer it took to settle the contract the less money there would be for them and their families. He also informed them that there would be no retroactive pay, and that someone was misleading them if they were being told otherwise. Explaining at trial why he could discuss union matters at roll call even though his earlier directive had explicitly banned such discussion, Hodgson asserted that different rules applied to him as sheriff.

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[1] 385 U.S. 493 (1967).

The three investigations had the following results. First, with respect to whether Presby impermissibly left his post to address a roll call, investigators determined that Presby did have permission to leave his post. Second, as to the open central control door, Morris and Presby were assigned to the area, neither recalled interacting with the administrator, and Presby specifically stated that he always complied with rules regarding entrance doors. The administrator reaffirmed, and filed a written report confirming, that the central control door was indeed open and that he had observed Morris and other personnel in the area. Finally, with respect to the investigation of the picket-related speech by Davignon, Gouveia, and Miller, interviews of more than sixty officers yielded written statements from four officers stating that the plaintiffs had spoken to them about the picket. In his statement one of the officers noted that he told one of the plaintiffs to get back to him when he had more information about the picket. None of the officers wrote that the plaintiffs harassed, pressured, solicited or coerced them during their brief conversations. Three of them gave oral statements and trial testimony consistent with their written statements. The one officer whom Davignon had allegedly telephoned, however, testified at trial that he felt harassed by the phone call.

Based on the investigation results and on the statement by one of the officers that he had been harassed, Hodgson suspended Davignon, Gouveia, and Miller for thirty days without pay, transferred

them to another facility, stripped them of their seniority rights and changed their days off from weekends to weekdays. Presby and Morris were suspended for ten days without pay based on the open door incident.

The suspension letters sent to Davignon, Gouveia, and Miller charged them with soliciting correctional officers to participate in a union picket. The letters cited Article VII of the Collective Bargaining Agreement as the basis for the suspensions but also pointed out that the plaintiffs' wrongful conduct "interfered with other correctional officers' performance of their duties" and adversely affected "the efficient operation of the department and potentially the health and safety of all employees."[2] Finally, the letters stated that the plaintiffs had used departmental telephones to solicit the other officers, in violation of departmental rules.[3] At trial, Hodgson acknowledged that neither Gouveia nor Miller used departmental telephones and that this particular charge was a typographical error.

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[2] Article VII, in its entirety, contains two sentences about work hours. Article VIII, on the other hand, does discuss policies applying to union representatives but only states that a steward list should be given to the sheriff and that stewards should be granted reasonable time off to "investigate and settle grievances, attend meetings of state and national bodies, including conventions without loss of pay."

[3] The letters also reference the plaintiffs' conduct during the investigation, but Hodgson does not rely on that basis on appeal.

The suspension letters the supervisor of the Ash Street facility sent to Presby and Morris charged that they had breached security while assigned to central control. The stated basis for the suspensions was the administrator's written report.

At trial, Hodgson elaborated on the various bases for the suspensions. With respect to Davignon, Gouveia and Miller, he generally reiterated the grounds cited in the suspension letters but added that he also relied on the oral statement by one of the officers about feeling harassed. Hodgson acknowledged that he believed the plaintiffs had pressured rather than harassed other officers. He also testified at length about the general risks present in the correctional facility setting and the dangers that speech like the plaintiffs' posed to the facility's security because of the great potential for distraction.

With respect to Presby and Morris, Hodgson said that the suspensions were based on the investigative report of the door incident. By contrast, Presby testified that in the past staff had pointed out opened doors but that no one had been punished as a result. Further, both Hodgson and the supervisor acknowledged that they did not investigate the administrator's report of another door left open.

Nowhere in the trial testimony was there identified a specific rule disallowing union speech during working hours aside from the sheriff's directive banning union speech at roll calls. Further, although Hodgson at one point testified that it was a violation

to be doing anything other than working in the facility, he later said that officers were permitted to talk about non-union related topics such as upcoming parades, sports, and other small talk subjects. Several witnesses testified that officers often discuss non-work related matters at work. Finally, there was testimony that departmental telephones at times were used to make personal calls.

II. Proceedings

The plaintiffs sued Hodgson in both his individual and official capacities, seeking damages and injunctive relief under 42 U.S.C. § 1983 for violation of their First Amendment rights of speech and association. All five plaintiffs also alleged violation of the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. Laws c. 12, §§ 11H, 11I, and asserted additional state law claims, including invasion of privacy under Mass. Gen. Laws c. 214 § 1B, and intentional interference with advantageous relations.

Following the court's denial of summary judgment for any party, the case was tried before a jury. The verdicts were mixed. On the § 1983 claims the jury found in favor of Hodgson in his individual capacity but against him in his official capacity, and awarded the plaintiffs lost wages. The jury also found for Morris under the MCRA but awarded no damages. It found in favor of Davignon, Gouveia and Miller for intentional interference with advantageous relations,

with no damages awarded to Davignon; and for Hodgson on the invasion of privacy claims.

Hodgson seasonably filed motions for judgment as a matter of law or for a new trial, to set aside the damage award or for remittitur. The district court denied these motions and awarded the plaintiffs attorney fees.

III. Discussion

On appeal, Hodgson presses four primary arguments: first, the district court erred in concluding as a matter of law that the First Amendment protected the plaintiffs' speech; second, no reasonable jury could have found that Presby's and Morris's punishments were in retaliation for their exercise of First Amendment rights; third, the jury's § 1983 individual capacity findings in favor of Hodgson were inconsistent with the findings in favor of Morris on his MCRA claim and in favor of Davignon, Gouveia and Miller on their intentional interference claims; and fourth, the district court erred in instructing the jury regarding the First Amendment claims. Two evidentiary challenges and an attack on the attorney fee award are also mounted. We consider these claims in turn.

We review de novo the district court's denial of a motion for judgment as a matter of law, *Acevedo-Delgado* v. *Rivera,* 292 F.3d 37, 40 (1st Cir. 2002) and the denial of a motion for new trial for abuse of discretion, *see Interstate Litho Corp.* v. *Brown,* 255 F.3d 19, 29 (1st Cir. 2001). The standards of review

applicable to specific issues are set out in the discussion of those issues.

A. Freedom of Speech Retaliation Claim

A government employee does not surrender all of her First Amendment rights at her employer's doorstep, *Garcetti* v. *Ceballos,* 547 U.S. 410, 417 (2006), and has the right to speak as a citizen addressing matters of public concern. *City of San Diego* v. *Roe,* 543 U.S. 77, 80 (2004). This right, however, is not absolute. *Connick* v. *Myers,* 461 U.S. 138, 150 (1983); *Curran* v. *Cousins,* 509 F.3d 36, 44 (1st Cir. 2007). "[A] governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public." *San Diego,* 543 U.S. at 80.

When analyzing First Amendment claims that arise in the government workplace, we follow an established route. As a threshold matter, we must determine whether the employee spoke as a citizen on a matter of public concern. *Rankin* v. *McPherson,* 483 U.S. 378, 384 (1987); *Baron* v. *Suffolk County Sheriff's Dept.,* 402 F.3d 225, 233 (1st Cir. 2005). If so, then we must balance the interests of the employee, as a citizen, in commenting upon matters of concern and the "interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Bd. of Educ.,* 391 U.S. 563, 568 (1968); *Mihos* v. *Swift,* 358 F.3d 91, 103 (1st Cir. 2004). If the balance weighs in

favor of the employee, it must then be determined whether the protected speech was a "substantial or motivating factor in the adverse action against the plaintiff." Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-282 (1977); *Curran*, 509 F.3d at 45.

The standard of review depends on the step. Because the first two prongs involve analyzing whether the speech is "of a character which the principles of the First Amendment protect, these determinations are always subject to *de novo* review."[4] *O'Connor* v. *Steeves*, 994 F.2d 905, 912 (1st Cir. 1993) (internal quotation marks and citation omitted). The last prong, causation, presents a question of fact. *Nethersole* v. *Bulger*, 287 F.3d 15, 18-19 (1st Cir. 2002). Accordingly, where a jury has decided causation *vel non*, we reverse only if no reasonable jury could have arrived at that conclusion. *Crowley* v. *L.L. Bean*, 303 F.3d 387, 393 (1st Cir. 2002). Here, the plaintiffs' evidence satisfies their burden at each step.

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[4] In this case the district judge curiously, after holding that the balance weighed in favor of the plaintiffs, nevertheless subsequently submitted the balancing question to the jury. *See Breaux* v. *City of Garland*, 205 F.3d 150, 156 n.9 (5th Cir. 2000) (describing the district court's decision to send the balancing question to the jury as "problematic"). This does not, however, impact our standard of review. *See Knowlton* v. *Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1177-78 (5th Cir. 1992) (reviewing balancing question de novo despite fact that district court sent question to jury).

1. Public Concern[5]

In answering the threshold question of whether the speech involves a matter of public concern we must determine if the employee's expression can fairly be considered to relate to "any matter of political, social, or other concern to the community." *Connick,* 461 U.S. at 146. This is a case-specific, fact-dependant inquiry. *Curran,* 509 F.3d at 45. We generally look to the "content, form, and context of a given statement as revealed by the whole record." *Id.* at 147-148; *Jordan,* 428 U.S. at 72. Content, however, is pre-eminent. *See O'Connor,* 994 F.2d at 914. If the employee's speech is on a topic that would qualify, "on the basis of its content alone" as a matter of inherent public concern, we needn't inquire further into the "form and context" of the expression. *O'Connor,* 994 F.2d at 914.

The plaintiffs argue that their speech, because it related to union activity, touched on a matter of "inherent public concern" and that we should therefore dispense with a more robust "content, form, and context" inquiry. We are reluctant to do so. In the past

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[5] The public concern inquiry is relevant to the claims of Davignon, Gouveia, and Miller. Hodgson has not on appeal addressed whether Presby's roll call speech involved a matter of public concern, and thus waives argument on that issue. *United States* v. *Zannino,* 895 F.2d 1, 17 (1st Cir. 1990). Hodgson did address the cause of Presby's suspension, which we analyze at step three. Plaintiff Morris claimed Hodgson retaliated against him based on his association with the union, and we take up that claim separately.

we have cautioned against allowing the inherent public concern category to draw too many types of cases within its gravitational pull. *See Fabiano,* 352 F.3d at 454 (noting, in refusing to categorically hold that public zoning lawsuits involve matters of inherent public concern, that "to use so broad a standard . . . would sweep nearly every public act under First Amendment protection").

To be sure, certain categories of speech carry residual guarantees of their public qualities and are often interpreted, justifiably, to involve matters of inherent public concern. *See Mihos,* 358 F.3d at 102-103 (public voting); *see also Baron,* 402 F.3d at 235 (reports to supervisors of official misconduct or wrongdoing within public office). Private speech to fellow employees regarding union activities is not necessarily imbued with those same public qualities. We are not alone in this conclusion. *See Boals* v. *Gray,* 775 F.2d 686, 693 (6th Cir. 1985) (holding that an employee's speech, simply because it is union-related, does not touch on matter of public concern as matter of law); *see also Gregorich* v. *Lund,* 54 F.3d 410, 415 (7th Cir. 1995) (determining inquiry into "precise content, form, and context" necessary despite the fact that case involved union activity).

The fact that the speech in this case related to union matters is not sufficient by itself to dispense with full-dress *Connick* analysis. But that fact does point in the direction of finding that the speech involved a matter of public concern. Other circuits have weighed union-related speech heavily in the

public concern calculus. *See Boddie* v. *City of Columbus,* 989 F.2d 745, 750 (5th Cir. 1993) (noting that "much more of the range of [union] activity than the range of employee speech . . . is not solely personal and is inevitably of public concern"); *Clue* v. *Johnson,* 179 F.3d 57, 61 (2d Cir. 1999) (noting that union activities which "necessarily entail a substantial criticism of management raise matters of public concern.") Here, not only did the plaintiffs' speech involve union activity in general, but one of the picket's stated purposes was to allow union members to publicly express criticism of management. At trial, Davignon, Gouveia, and Miller all testified to this fact, specifically asserting that the picket would publicize Hodgson's alleged unfair treatment of correctional officers.

Moreover, the plaintiffs' speech at least touched on newsworthy subjects. The speech contained information about a picket specifically intended to alert the public to the behavior of Hodgson, a politically elected official. *See Connick,* 461 U.S. at 148 (noting that speech may involve a matter of public concern if it attempts "to bring to light actual or potential wrongdoing or breach of public trust on the part of [government official]").

Hodgson characterizes the plaintiffs' statements to fellow officers as being related only to their "personal grievances" with management. He further says that the plaintiffs spoke solely out of self-interest. Both of these arguments are wanting. First, the statements were not muttered complaints about

Hodgson or his administration but rather were responses to questions about – or requests for support of – an upcoming picket. Even if we were to construe the content of the statements as being indirectly critical either of Hodgson's behavior toward the correctional workers or of the administration's stance in the collective bargaining process, such would not automatically strip the speech of its public qualities. *See Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-416 (1979) (noting fact that employee's workplace speech criticized her government employer did not necessarily indicate that it did not involve matter of public concern). Second, although it would be naive to think that the plaintiffs in this case were moved to speak solely by the spirit of civic-mindedness, our cases do not mandate selflessness on the part of plaintiffs. *See Fabiano,* 352 F.3d at 455 (holding employee's speech touched on a matter of public concern where his purpose in filing the lawsuit "was to restore the integrity of the zoning process and remedy parking congestion" in addition to protecting his property interest).

It is true that the plaintiffs stood to benefit in many ways from persuading co-workers to attend the picket. Nevertheless, the record also supports a conclusion that the plaintiffs wanted to improve the collective bargaining process as a whole and attempted to do so through the time tested method of drawing the public's attention to what they considered unfair behavior on the part of the defendant. *Compare Saulpaugh* v. *Monroe Cmty. Hosp.*, 4 F.3d

134, 143 (2d Cir. 2002) (complaints of sexual harassment did *not* involve matter of public concern because personal in nature and not related to employer's broader policies). The fact that the plaintiffs hoped their speech would benefit them personally in some respects is not fatal to their case. *See Gregorich,* 54 F.3d at 416 (holding plaintiff-employee's union-organizing effort involved matter of public concern where its purpose was to effect change in management policy to benefit himself and co-workers).

2. Balancing the Interests

In balancing the interests of the employer and employees in this case, we look first to the teaching of *Waters* v. *Churchill,* 511 U.S. 661 (1994) with respect to the speech engaged in by plaintiffs Davignon, Gouveia, and Miller.[6] *Waters* applies where the employer who took disciplinary action did not have personal knowledge of the true content of the employee's speech but rather relied on another's reports of what the employee said. *See id.* at 678.[7]

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[6] The *Waters* analysis, like the public concern inquiry, is not applicable to Presby because Hodgson contends that he disciplined Presby based on the "door" incident rather than on anything Presby said.

[7] A court may engage in a *Waters* analysis when determining whether the speech involved a matter of public concern, *Meaney* v. *Dever,* 326 F.3d 283, 288-289 (1st Cir. 2003), or when examining the employer's determination that government interests outweighed the plaintiff's interest in speaking. *See*

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Under *Waters,* we apply the balancing analysis to the facts as the employer believed them to be if the employer arrived at its conclusion reasonably and in good faith. *See Waters,* 511 U.S. at 677; *see also Kearney* v. *Town of Wareham,* 316 F.3d 18, 24-25 (1st Cir. 2002) ("employer may rest . . . action on evidence produced in an internal investigation so long as the findings gleaned from the investigation are facially reasonable and drawn in good faith") (citing *Waters,* 511 U.S. at 677).

Here, plaintiffs put forward evidence that, while Hodgson may not have acted with bad faith, he acted unreasonably in arriving at his suspension decision. As the suspension letters indicate, Hodgson took action because he believed the plaintiffs' speech, as reported, involved solicitation of other officers, caused interference with the other officers' performance of duties, and created safety risks. In arriving at this conclusion, however, the defendant consulted four written reports that did not characterize the plaintiffs' statements as solicitation, contained virtually no mention of distraction or interference with work responsibilities, and did not reference any safety risks whatsoever.

Waters, 511 U.S. at 680 ("the potential disruptiveness of the speech *as reported* was enough to outweigh whatever First Amendment value it might have had") (emphasis added); *see also Hennessy* v. *City of Melrose,* 194 F.3d 237, 247 (1st Cir. 1999).

At trial the defendant also testified that he largely relied on the one officer's oral comment mentioning harassment. But that officer's later report, which Hodgson also said he relied upon, did not comport with the oral statement. As the Supreme Court has emphasized, when there is a reasonable likelihood that what an employee said is protected by the First Amendment, an employer "must tread with a certain amount of care." *Waters,* 511 U.S. at 678. Here, Hodgson had strong evidence indicating the plaintiffs' speech was not disruptive. At the least, this evidence should have prompted him to engage in further investigation. *See Waters,* 511 U.S. at 678 (indicating employer's decision-making may be unreasonable if investigation used falls outside range of what reasonable manager would use). Accordingly, when balancing the respective interests we will take a fresh look at the facts and not simply examine the facts as the employer believed them to be. *See id.* at 677.

The balancing test employed at this step, "*Pickering* balancing," requires a balancing of "the value of an employee's speech . . . against the employer's legitimate government interest in 'preventing unnecessary disruptions and inefficiencies in carrying out its public service mission.'" *Guilloty Perez* v. *Pierluisi,* 339 F.3d 43, 52 (1st Cir. 2003) (citing *O'Connor,* 994 F.2d at 915). In evaluating the government's interest, a number of factors may be considered. Among these are (1) the time, place, and manner of the employee's speech, *Connick,* 461 U.S.

at 153 (noting that speech will likely be more disruptive if it occurs during work hours, at the office, or requires the speaker or others to leave work stations), and (2) the employer's motivation in making the adverse employment decision. *See Mihos,* 358 F.3d at 103 (noting if the employer retaliated entirely out of self-interest as opposed to a legitimate concern about the functioning of government services, the government's side of the balance is undermined). Ultimately, *Pickering* balancing, like the public concern analysis, is highly fact specific. *See Evans-Marshall* v. *Bd. of Educ.,* 428 F.3d 223, 239 (6th Cir. 2005); *see also Gustafson,* 290 F.3d at 909 (citation omitted).

In emphasizing the government's interests, both Hodgson and amici raise concerns that are not insubstantial. In addition to contending that the plaintiffs' speech caused actual disruption, Hodgson testified about the more general need to assert control over correctional officers' speech. He spent considerable time detailing the pressurized, high-stakes environment in which the officers work and relating how, in particular, if plaintiffs' speech was left unchecked, it could have potentially disrupted that environment, creating risks to the safety of employees and inmates alike.

Maintaining discipline and harmony in the workplace is a valid governmental interest. *See Rankin,* 483 U.S. at 388 (noting that, in balancing the interests under *Pickering,* courts may ask "whether the statement impairs discipline by superiors or harmony among co-workers, [or] has a detrimental

impact on close working relationships for which personal loyalty and confidence are necessary.") (citing *Pickering,* 391 U.S. at 570-573). The need for "discipline, maintenance of harmony among co-workers, and close working relationships requiring personal loyalty and confidence is greater in the context of law enforcement." *Guilloty Perez,* 339 F.3d at 53; *see also Conaway* v. *Smith,* 853 F.2d 789, 798 (1st Cir. 1988). Putting aside practical distinctions between correctional facilities and police departments, the importance of safety within correctional facilities cannot casually be dismissed.

Although expressing valid interests, the defendant has not in our view demonstrated how the plaintiffs' speech here created harm or increased risks. There was no evidence of actual disruption, despite the fact that the plaintiffs spoke at work and during work hours. The plaintiffs' statements to fellow employees were brief, generally lasting a matter of seconds. The brevity of these statements likely posed no greater danger than the small talk regularly engaged in during working hours. At trial, the sole evidence presented about distraction was one officer's testimony that he was taken from his post "in a sense" by Davignon's phone call. Taking nothing away from whatever subjective view that officer holds of his post, Davignon, both in interviews and at trial, denied ever consulting that officer about the picket. Against the competing evidence, this lone characterization of a conversation by one officer is rather thin.

Against the scant evidence of actual disruption, Hodgson reasonably asserts that a government employer is entitled to consider not only whether the employee's speech actually disrupted the work place environment but also whether the speech had the potential to disrupt. He argues that the plaintiffs' speech threatened to "disintegrate" working relationships by creating a division between officers sympathetic to the union and those who were not.

Indeed, an employer may consider a speech's potential to disrupt. *See Connick,* 461 U.S. at 152 ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"). Nevertheless, there is a significant question on these facts whether Hodgson suspended the plaintiffs because of their speech's *potential* to disrupt when the suspension letters issued to the plaintiffs refer solely to the *actual* disruption the speech caused.

In any event, the record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers. Testimony and the investigative reports reveal that when the plaintiffs approached other officers they did so in a civil, non-threatening manner. *See Lewis* v. *Harrison Sch. Dist.,* 805 F.2d 310, 315-316 (8th Cir. 1986) (upholding jury's finding that plaintiff's speech was not disruptive where speech was civil in tone). In fact, the evidence was that in some instances, other

officers actually sought information from the plaintiffs about the picket.

If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, we find not even the specter of such harm. The "mere incantation of the phrase 'internal harmony in the workplace' is not enough to carry the day." *Gustafson,* 290 F.3d at 911 (citing *Hulbert* v. *Wilhelm,* 120 F.3d 648, 655 (7th Cir. 1997)); *see also Weast* v. *Pierce Cty.,* 34 Fed. Appx. 587, 589 (9th Cir. 2002) (determining record did not support conclusory allegations that officer's speech criticizing management could disrupt department operations).

Hodgson warns that if the plaintiffs were to prevail here, the safety and efficiency of correctional facilities everywhere would be compromised. But we do not view this case as being about whether a correctional facility employer can prohibit all non-work related conversation on the job. Rather, we engage in *Pickering* balancing of the interests presented, necessarily taking into account a number of highly case specific factors. Included among these are the employer's motives in taking the adverse action.

In this case, there is ample evidence that Hodgson suspended the plaintiffs not out of a legitimate concern that their speech compromised safety at the correctional facilities but because of their pro-union

activity. First, the timing of the suspensions is suspect. When Hodgson suspended the five active union members, he had already demonstrated significant frustration with the union, indulging in a outburst during one negotiation session in particular. Both Davignon and Presby, part of the union's negotiating team, were present at this session. *See Mihos,* 358 F.3d at 103 (noting government side of scale undermined if evidence indicates employer fired employee in a "retaliatory fit of pique").

Additionally, Hodgson's own actions and pattern of enforcement further undermine his claim of legitimate motives. Although asserting that discussion of union matters is particularly divisive and poses a serious risk of disruption, Hodgson used roll call to personally discuss these same union matters. Relatedly, if Hodgson was so concerned that any non-work focused speech would create such serious distractions and risks, we think it is more than curious that he would allow employees to discuss things such as parades and sports without punishment.

Finally, Hodgson argues that the fact that the plaintiffs were not authorized to "conduct" union business on county time further bolsters the government's interest. On the facts of this case, this argument is unpersuasive for two reasons. First, while the issue of whether the plaintiffs violated office policy is not irrelevant to the *Pickering* inquiry, *see Connick,* 461 U.S. at 153, it is unclear what policy Hodgson relies on. Nowhere in the collective bargaining agreement, the list of the duties and responsibilities

of correctional officers, or the code of ethics/employee conduct and work rules is the topic of "conducting" union business specifically addressed. Moreover, it is highly doubtful that the brief asides about an upcoming picket that took place here constitute "conducting" union business, any more than, for example, posting a notice would.

Because Hodgson acknowledges that he disciplined Davignon, Gouveia, and Miller because of their speech, our analysis of their claims ends here. But, because Hodgson proffered a non-speech based reason for Presby's suspension, we must analyze Presby's claim at step three.

3. Causation

Unlike Davignon, Gouveia and Miller, who the defendant acknowledges were disciplined for their speech, in order for Presby to prevail he must demonstrate that his protected expression was a "substantial or motivating factor in the adverse employment decision. *Mt. Healthy City Sch. Dist. Bd. Educ.*, 429 U.S. at 287. This is simply a question of causation. *See Tejada-Batista* v. *Morales*, 424 F.3d 97, 101 (1st Cir. 2005) (noting that *Mt. Healthy* "comports with [] traditional tort-law principle[s]").

Causation is thus ordinarily analyzed in two steps. *Yerardi's Moody St. Rest. & Lounge, Inc.* v. *Bd. of Selectmen*, 932 F.2d 89, 91 (1st Cir. 1991); *Mullin*, 284 F.3d at 38. First, the plaintiff must show that the employer would not have taken adverse action but for

the plaintiff's speech.[8] *Tejada-Batista,* 424 F.3d at 101. The plaintiff, in establishing this causal link, need not produce direct evidence of his employer's motivation and accordingly may rely on circumstantial evidence. *Guilloty Perez,* 339 F.3d at 56-57 (internal quotation marks and citation omitted). If the plaintiff meets that burden, the burden shifts to the employer, and the court must afford the employer the opportunity to sever the causal link. *O'Connor,* 994 F.2d at 913. Hodgson may accomplish this task by establishing, by a preponderance of the evidence, that he would have taken the adverse action even had Presby not engaged in protected speech. *Id.*

A reasonable jury could have found Presby would not have been suspended but for his speech at the roll call. Although Hodgson asserts that Presby was suspended because he left a facility door open, the record contains substantial circumstantial evidence indicating otherwise.

First, the timing of both the investigation and the suspension is questionable. Hodgson ordered the open door incident investigation a little over a week after Presby spoke at the roll call. *See Nethersole,* 287 F.3d at 19 (noting employer's actions immediately following alleged protected speech relevant to

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[8] We emphasize that the plaintiff's burden under *Mt. Healthy* is more substantial than a plaintiff's burden of producing prima facie evidence in a Title VII discrimination case. *Guilloty Perez,* F.3d at 56 n.11.

causation inquiry even though ostensibly related to different incident). Further, the suspension for the door incident was issued the day after an internal affairs inquiry began to establish that Presby had permission to leave his post and address roll call.

Second, the suspension relied on the word of one person as opposed to the word of two others. While an employer is not prohibited from crediting one person's report of an incident over others, context matters. Here, the one person happened to be a member of management, while the two others were active union members. Along with the other evidence of pretext, the jury was entitled to consider whether acceptance of one version over the other revealed a desire to punish Presby for his roll call speech under the guise of something else. At the least, the conflicting evidence in these circumstances should have prompted further investigation, for example, questioning others assigned to the central control area. *See also Am. Postal Workers Union* v. *United States Postal Serv.*, 830 F.2d 295, 311 (D.C. Cir. 1987) (noting employer's failure to investigate further in face of conflicting evidence strongly suggested asserted reason for taking adverse action was pretext).

Third, the deviation from standard reporting procedures, evidenced by both the administrator's oral report to Hodgson – coming eleven days after the alleged incident, as well as by the administrator's late written report – filed a month and a half after the same incident, casts more doubt on the investigation's integrity. Even absent any charge of collusion, the

fact that the discipline decision relied on substantially delayed reports, rife with all the risks of faulty memory, again calls into question the true motive for using the incident as grounds for suspension.

Finally, the jury had before it the trial testimony of Presby, the supervisor and Hodgson himself, establishing the absence of other investigations of, and punishments for, similar incidents. Presby testified that although the door had been left open on a number of prior occasions, no one had been punished in connection with those incidents. To be sure, past wrongs do not make a right, and conceivably Hodgson could have decided to step up enforcement. However, both Hodgson and the supervisor testified that, despite the fact that the same administrator reported another door being left open, Hodgson chose not to pursue an investigation of that incident. This inference of selective enforcement bolsters Presby's theory that Hodgson used the door incident as a pretext in order to retaliate against Presby for his protected speech.

This testimony, together with the timing of the investigations and suspensions, as well as the reliance on late reports from a person in the management ranks in the face of contradicting evidence, was sufficient to shift the burden to Hodgson and require him to prove that Presby would have been suspended even in the absence of his protected conduct. For his part, Hodgson pointed to the report detailing the

administrator's observations to justify the disciplinary decision. A reasonable jury could have found that this was not enough.

B. Freedom of Association Retaliation Claim

Morris does not contend that Hodgson retaliated against him based on anything he said. Rather, Morris claims Hodgson suspended him because of his active association with the union.

The relevant question is whether Hodgson suspended Morris based on the open door incident or based on his union association.[9] The *Mt. Healthy* causation inquiry applies in instances where a government employee claims her employer has taken adverse action that is violative of associational rights. *See Gomez* v. *Rivera Rodriguez,* 344 F.3d 103, 110 (1st Cir. 2003) (requiring that a plaintiff show that "political affiliation was a substantial or

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[9] Neither the Supreme Court nor this Circuit has decided whether the public concern requirement extends to an employee's claim that an employer has retaliated based on association. *See Shrum* v. *City of Coweta,* 449 F.3d 1132, 1138 (10th Cir. 2006). We have explicitly reserved this question, *Tang,* 163 F.3d at 11 n.4, which has divided the Courts of Appeals. *See Shrum,* 449 F.3d at 1139 n.3 (listing circuits definitively resolving issue). Hodgson's brief assumes that we do require that the associational activity in question involve a matter of public concern, but does not adequately address why Morris's union association did not, in fact, implicate such a matter. Thus, the public concern issue as to Morris is waived. *Zannino,* 895 F.2d at 17.

motivating factor in the decisional calculus") (internal citation omitted).

On this point we may be brief. Morris described himself as "very involved," with the union and, at the time of his suspension, had an active role in the collective bargaining negotiations. Hodgson suspended Morris against the backdrop of these negotiations. Because Hodgson charged and suspended Morris and Presby based on the same incident, we do not need to again reference the various shortcomings of Hodgson's proffered reason for the suspensions. The jury reasonably could have determined that Morris was punished because of his association with the union.

C. Jury Instructions

Hodgson contends that the district court erred in refusing to give two of his requested jury instructions. His requests emphasized that: (1) "judicial review of prison officials' actions is very limited," thus courts "must give appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement,"; and (2) "even absent the special deference given to prison administrators, potential disruptiveness can outweigh the employee's free speech interests."

We review jury instructions de novo. *Seahorse Marine Supplies, Inc.* v. *P.R. Sun Oil Co.*, 295 F.3d 68, 76 (1st Cir. 2002) (citing *United States* v. *DeStefano*,

59 F.3d 1, 2 (1st Cir. 1995)). Where a district court refuses to give a party's requested instruction, however, we will reverse only if the requested instruction was "(1) correct as a matter of substantive law, (2) not substantially incorporated into the charge as rendered, and (3) integral to an important point of the case." *White* v. *New Hampshire Dep't of Corr.*, 221 F.3d 254, 263 (1st Cir. 2000) (internal citation omitted). Hodgson timely objected to the failure to give his requested instructions; thus if it was error not to give them, we must determine whether the error was harmless. *See Scarfo* v. *Cabletron Sys.*, 54 F.3d 931, 939 (1st Cir. 1995).

There was no error in refusing to issue Hodgson's requested instructions. With respect to the requested "deference instruction," Hodgson does not cite any precedent suggesting that courts should give special deference to *employment* decisions made by correction officials. Rather the cited cases involve correction officials making decisions affecting inmates. *See, e.g.*, *Jones* v. *N.C. Prisoners' Labor Union.*, 433 U.S. 119 (1977) (operation of prisoners' union); *Devaney* v. *Hall*, 509 F. Supp. 497 (D. Mass. 1981) (former inmate's complaint against officers and employees of department of corrections). The requested jury instruction was therefore not required as a matter of substantive law.

The other requested instruction, emphasizing "potential disruptiveness," was correct as a matter of substantive law. But this instruction was substantially incorporated into the charge to the jury. The

jury was instructed that, when balancing the relevant interests, it should take into account:

> [T]he Sheriff's interest in promoting the efficiency of the public services performed through employees . . . The factors that are relevant . . . are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his duties or impairs working relationships with other employees.

The jury thus understood that speech "creates disharmony," or "impairs working relationships" if it actually disrupts *or* if it creates a potential for disruption. The district judge did not word the instruction in such a way as to suggest that the jury had to find actual disruption, e.g., "created disharmony," or "impaired working relationships." In criminal cases we have said that a defendant has a right to an instruction on his theory of the case when the theory is supported by the record and is valid. *DeStefano,* 59 F.3d at 5. But even in criminal cases, "so long as the charge sufficiently conveys the defendant's theory, it need not parrot the exact language that the defendant prefers." *United States* v. *McGill,* 953 F.2d 10, 12 (1st Cir. 1992) (internal citation omitted). Here the district court's charge to jury sufficiently conveyed Hodgson's theory.

Even if the failure to give the requested instructions was error, the error was harmless. A new trial is called for only "if the error could have affected the result of the jury's deliberation." *Romano* v. *U-Haul*

Int'l, 233 F.3d 655, 667 (1st Cir. 2000) (citing *Allen* v. *Chance Mfg. Co.,* 873 F.2d 465, 469 (1st Cir. 1989)). Here, even if the district court had specifically used the phrase "potential disruptiveness" in the instruction it is unlikely that the jury would have reached a different conclusion. At trial, the plaintiffs discredited the theory that Hodgson acted because the plaintiffs' speech posed the potential for disruption. *See Romano,* 233 F.3d at 667 (harmless error in instruction where prevailing party presented evidence at trial sufficient to dispel concern proper instruction would have influenced verdict). And further, as discussed above, the jury almost certainly considered the potential for disruption given the language of the actual instruction.

D. Inconsistent Verdicts Claim

When reviewing claims of inconsistency between general civil jury verdicts, we do not have the compulsion of a specific procedural rule to determine the existence of an inconsistency. *Merchant* v. *Ruhle,* 740 F.2d 86, 89 (1st Cir. 1984). We are, however, reluctant to order a new trial on the basis of inconsistent jury verdicts. *Connelly* v. *Hyundai Motor Co.,* 351 F.3d 535, 540 (1st Cir. 2003). When a party claims that jury verdicts are inconsistent, we "attempt to reconcile the jury's findings, by exegesis if necessary." *Acevedo-Diaz* v. *Aponte,* 1 F.3d 62, 74 n.15 (1st Cir. 1993). This exercise involves determining whether the jury could have, consistent with its instructions, rendered the challenged verdicts. *See Merchant,* 740

F.2d at 91. In undertaking this analysis we view the facts in the light most favorable to the verdict. *Id.*

Hodgson claims that the jury's general verdicts were inconsistent in two ways.

1. Alleged inconsistency between § 1983 and Intentional Interference with Advantageous Relationship verdicts.

First, Hodgson argues that the jury's finding in his favor on Davignon's, Gouveia's, and Miller's § 1983 individual capacity claims is inconsistent with its finding that those same plaintiffs were entitled to judgment on their intentional interference with advantageous relations[10] claims. In this argument, Hodgson relies on the fact that the jury specifically found that he did not act "willfully, maliciously, or with reckless indifference to the plaintiff's constitutional rights" and consequently did not award punitive damages to the plaintiffs on their § 1983 claims.

In analyzing this claimed inconsistency we look to distinctions between the federal punitive damage standard under § 1983 and the elements a plaintiff must prove exist to recover on a state intentional interference claim. Under § 1983, a jury may levy

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[10] Although the state law claim is referred to as "wrongful interference with advantageous relations" in the briefs and in the jury instructions, the claim is more commonly referred to in the relevant decisional law as "intentional interference with advantageous relations." Accordingly, we do so here.

punitive damages when a defendant's conduct is "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith* v. *Wade*, 461 U.S. 30, 56 (1983); *see also Iacobucci* v. *Boulter*, 193 F.3d 14, 25-26 (1st Cir. 1999). In *Iacobucci*, we emphasized that the "evil motive," "intent," or "reckless or callous indifference" pertains to the "*defendant's knowledge that [he] may be acting in violation of federal law.*" *Iacobucci*, 193 F.3d at 26 (emphasis added) (internal quotation marks and citation omitted).

As for the state law claim, in order for a plaintiff to recover for intentional interference with advantageous relations he must prove, among other elements, that the defendant intentionally interfered with the employment relationship and that this interference "was improper in motive or means." *See Weber* v. *Cmty. Teamwork, Inc.*, 434 Mass. 761, 781 (2001). Where the defendant is a supervisor the plaintiff must also show that the improper motive or means rose to the level of "actual malice" and was the "controlling factor" in the defendant's interference. *Id.* Whether Hodgson possessed "actual malice" depends on whether he had a "'spiteful, malignant purpose, unrelated to the legitimate corporate interest' of the employer," *id.* at 782. Put differently, the question is whether the defendant "was personally hostile or harbored ill will toward the plaintiff." *Sklar* v. *Beth Isr. Deaconess Med. Ctr.*, 59 Mass. App. Ct. 550, 554,

797 N.E.2d 381 (2003) (citing *Weber,* 434 Mass. at 783).

The jury's verdicts on the § 1983 and intentional interference claims can be reconciled. The court specifically instructed the jury that it could award punitive damages if it found that the defendant acted "willfully, maliciously, or with reckless indifference to the plaintiff's *constitutional rights.*" (emphasis added). The jury could have determined that Hodgson had a "spiteful, malignant purpose," namely, to silence those speaking out in favor of the union, but that he believed that silencing them was permissible under federal law. *See Kolstad* v. *ADA,* 527 U.S. 526, 537 (noting punitive damages inappropriate where employer believes actions are lawful); *see also Iacobucci,* 193 F.3d at 26. Moreover, the jury may have determined that, First Amendment issues aside, Hodgson was hostile towards the plaintiffs. *See Weber,* 434 Mass. at 783. Those plaintiffs who recovered on the intentional interference claim, Davignon, Gouveia, and Miller, all testified that Hodgson was hostile toward them at roll call. All three testified to his threatening remarks regarding their employment status, and Davignon and Gouveia additionally stated that Hodgson stared at them when referencing "troublemakers." The jury could have reasonably construed such behavior as evidencing hostility.

2. Alleged inconsistency between § 1983 and Massachusetts Civil Rights Act verdicts

Hodgson also contends that the jury's finding in his favor on Morris's § 1983 individual capacity claim renders inconsistent the verdict in favor of Morris on his MCRA claim.

Hodgson says first that, as to all plaintiffs, the jury found him liable only in his official capacity and not in his individual capacity. Further, with the exception of Morris, the jury found that Hodgson did not violate the plaintiffs' rights under the MCRA. Hodgson argues that these findings in his favor were tantamount to finding that he was entitled to qualified immunity. It follows, the argument goes, that the jury's verdict in favor of Morris on *his* MCRA claim was erroneous and inconsistent with the verdicts in Hodgson's favor under § 1983. Hodgson also argues that the MCRA requires Morris to establish that Hodgson interfered with his exercise or enjoyment of rights by "threats, intimidation or coercion," and that Morris failed to prove the existence of one of these additional elements.

The plaintiffs have two responses. First, they say that a finding of qualified immunity is irrelevant to Morris's MCRA claim because the claim is based on a separate incident in which Hodgson was not acting under the "color of state law," a necessary ingredient for qualified immunity. Specifically, they cite an incident where Hodgson confronted Morris outside

the correctional facility and chastised him for not wearing a hat. If Hodgson was not acting under the color of state law, they argue, he could not avail himself of the qualified immunity defense. *See Burke v. Town of Walpole,* 405 F.3d 66, 76 (1st Cir. 2005) (noting that qualified immunity applies when a person's rights are infringed by *state actors*) (emphasis added) (internal citation omitted). Second, the plaintiffs argue that Morris proved Hodgson interfered with his constitutional rights by "threats, intimidation, or coercion" by presenting evidence that Hodgson, during the hat incident, addressed Morris in an "aggressive, angry, and arrested" manner.

We agree with the plaintiffs that the jury's verdicts are indeed susceptible to a consistent, albeit strained, reading.

First, the jury could have, as the plaintiffs argue, found that Hodgson was not acting under the color of state law and thus was not shielded by qualified immunity. This theory is viable because, even though the MCRA claim may be thought of as a state law analogue to the federal § 1983 claim, and even though courts have held the same qualified immunity standard applies to both laws, the MCRA does not require state action.[11]

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[11] Compare "Whenever any person or persons, whether or not acting under color of law . . . ," G.L. c. 12, § 11H with "Every person, who under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia . . . ," 42 U.S.C. § 1983.

In resolving the "under color of law" question in the past we have examined the totality of the circumstances, to determine whether the "state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or . . . is such that the actor could not have behaved in that way but for the authority of his office." *Martinez* v. *Colon,* 54 F.3d 980, 986 (1st Cir. 1995). Admittedly, a finding that Hodgson was not acting "under the color of law" during this incident required the jury to engage in mental gymnastics. For one thing, looked at in isolation there is little evidence in the record about the hat incident, and the facts that are present, such as the fact that the incident occurred in the vicinity of the correctional facility, seem to cut against a finding of no state action. *See Zambrana-Marrero* v. *Suarez-Cruz,* 172 F.3d 122, 125 (1st Cir. 1999) (noting location of incident relevant to analysis). Nevertheless, the jury could have found that Hodgson, when chastising Morris for not wearing his hat, was not enforcing any official duties given that departmental policy, according to testimony at trial, did not require Morris to wear a hat. In the end, we accord the jury's conclusion respect, especially since determining whether a defendant acted under color of state law can often be "particularly elusive," *id.,* and reminding ourselves of our duty to read the jury's verdicts consistently if possible. *See Malm* v. *United States Lines Co.,* 269 F. Supp. 731, 731-32 (S.D.N.Y. 1967), aff'd, 378 F.2d 941 (2d Cir. 1967) (recognizing jury's right to "idiosyncratic position provided the challenged verdict is based on the evidence and the law").

As to Hodgson's second contention – that Morris did not establish "threats, intimidation or coercion," – the jury could have reasonably found that Hodgson's behavior towards Morris amounted to intimidation, and thus that Morris met one of the three additional requirements under the MCRA. The Massachusetts Supreme Judicial Court has defined "intimidation" as "putting in fear for the purpose of compelling or deterring conduct." *Planned Parenthood League of Mass. Inc.* v. *Blake,* 417 Mass. 467, 474 (1994) (citations omitted), cert. denied, 513 U.S. 868 (1994). Morris testified that Hodgson, "spun the wheels of his car," before getting out of the car and confronting him in an "aggressive, angry, and arrested" manner. Morris also testified that Hodgson's behavior intimidated him. Given that Morris held a position on the negotiating subcommittee, the jury could have rationally concluded that Hodgson intended to intimidate Morris in order to frustrate his associational rights. Accordingly, we affirm the verdict in favor of Morris on his MCRA claim.

E. Evidentiary Claims

1. Admission of state agency decision

The district court admitted into evidence a decision rendered by the Massachusetts Labor Relations Commission (MLRC) – a state administrative agency. The MLRC is charged with resolving labor disputes by enforcing Massachusetts labor laws, and its decision addressed whether the Bristol County Sheriff's

Department violated various sections of M.G.L. C. 150E.

Hodgson argues that the district court erred in admitting the MLRC decision into evidence. He claims (1) the findings of fact in the decision are inadmissible hearsay and (2) that even assuming the decision is otherwise admissible, the district court should have excluded it under Federal Rule of Evidence 403.

We review a district court's decision to admit evidence for abuse of discretion. *United States* v. *Jimenez,* 419 F.3d 34, 43 (1st Cir. 2005). We find no abuse here.

First, the decision was admissible under the public records exception to the rule against hearsay. *See,* Fed.R.Evid. 803(8). The public records exception allows a district court to admit public records and reports, in any form, of public agencies setting forth,

> in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.

Id. (C). "The Supreme Court has interpreted this 'public records' exception to the hearsay rule broadly to include both conclusions and opinions of public offices and agencies." *Patterson* v. *Mills,* 64 Fed. Appx. 457, 462 (6th Cir. 2003) (citing *Beech Aircraft Corp.* v. *Rainey,* 488 U.S. 153, 162 (1988)).

Hodgson relies on cases holding that judicial findings of fact in a previous case are inadmissible under Rule 803(8)(c). *See e.g., Herrick* v. *Garvey,* 298 F.3d 1184, 1192 (10th Cir. 2002); *Milan Express* v. *Averitt Express,* 254 F.3d 966, 983, n.25 (11th Cir. 2001). But the Massachusetts Labor Commission is not a court, and its determinations are not stamped with the judicial imprimatur that the findings of a court are. The Commission's findings are thus less likely than those of a court to be given disproportionate weight by a jury. *See Herrick,* 298 F.3d at 1192.

Turning to Hodgson's Rule 403 objection, we conclude that the district court did not abuse its discretion in admitting the decision. Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. We have emphasized that "only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *United States* v. *Flemmi,* 402 F.3d 79, 86 (1st Cir. 2005) (internal quotation marks and citation omitted); *see also Paolitto* v. *Brown E. & C. Inc.,* 151 F.3d 60, 65 (2d Cir. 1998) (noting district court in best position to consider how admission of agency report will impact trial).

The MLRC's decision was highly probative given both the identity of the parties and the fact that the decision pertained to the same incidents that gave

rise to this federal action. The judge was entitled to take that value into account. Moreover, the admission of the decision did not unfairly prejudice Hodgson. As we have stressed in the past, "virtually all evidence is prejudicial . . . but it is only *unfair* prejudice against which the law protects." *United States* v. *Pinillos-Prieto,* 419 F.3d 61, 72 (1st Cir. 2005) (internal quotation marks and citation omitted) (emphasis in original). Any potential for unfairness was mitigated by the district judge expressly instructing the jury that the MLRC's decision involved a different issue and was not binding on the jury.

2. Decision to reopen to permit plaintiff to present evidence of lost wages

After the close of evidence the district court allowed the plaintiffs to reopen and present evidence of the amounts of their lost wages. Although the plaintiffs had a witness available, Hodgson stipulated to the amounts but objected to the court's decision to reopen.

A district court's decision to reopen the record to permit the introduction of additional evidence is reviewable for abuse of discretion. *United States* v. *Santana,* 175 F.3d 57, 64 (1st Cir. 1999); *Lussier* v. *Runyon,* 50 F.3d 1103, 1113 (1st Cir. 1995). While the court's decision turns on flexible and case-specific criteria, among the factors the district court should consider are "whether (1) the evidence sought to be introduced is especially important and probative; (2)

the moving party's explanation for failing to introduce the evidence earlier is bona fide; and (3) reopening will cause no undue prejudice to the non-moving party." *Rivera-Flores* v. *Puerto Rico Tel. Co.*, 64 F.3d 742, 746 (1st Cir. 1995) (citing *Joseph* v. *Terminix Int'l Co.*, 17 F.3d 1282, 1285 (10th Cir. 1994)).

There was no abuse of discretion in allowing the additional evidence. First, the plaintiffs' evidence on lost wages was highly probative, as it was the only evidence of the precise amount of compensatory damages. *Compare Joseph*, 17 F.3d at 1285 (noting that "new" evidence would have been cumulative). Second, the plaintiffs appeared to have a bona fide explanation for failing to introduce the evidence, namely "reasonably genuine surprise." *See Rivera-Flores*, 64 F.3d at 747 (explaining that "it may amount to an abuse of discretion for a trial court to *decline* to reopen in circumstances where the movant has demonstrated 'reasonably genuine surprise'") (emphasis added) (internal citation omitted). The plaintiffs appear to have been operating under the assumption that they could introduce damages at a later stage and expressed genuine surprise once faced with the prospect of losing such an opportunity. *Compare Bradford Trust Co.* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 49, 52-53 (2d Cir. 1986) (affirming lower court's denial of motion to re-open where lower court repeatedly warned that moving party would need to present evidence on "key issue"). Finally, because the plaintiff had a readily available witness who would testify as to lost wages,

see Rivera-Flores, 64 F.3d at 749 (noting defendant not unduly prejudiced where "introduction of [] readily obtainable documentary evidence could have entailed but minimal delay"), and because Hodgson would have the opportunity to cross-examine this witness, the reopening did not cause undue prejudice.

F. Attorneys Fees

The plaintiffs requested and the district court awarded attorney's fees in the amount of $172,248.21 and expenses of $2,481.75. Hodgson argues this award is excessive for three reasons: (1) the limited dollar amount of the verdict in the plaintiffs' favor; (2) the failure of the plaintiffs' claims for invasion of privacy; and (3) the fact that the plaintiffs' fee request contained "excessive, duplicative, and repetitive hours."

We deferentially review a district court's fee award and thus give substantial respect to the court's informed discretion. *Coutin* v. *Young & Rubicam P.R.,* 124 F.3d 331, 336 (1st Cir. 1997); *Diaz-Rivera* v. *Rivera-Rodriguez,* 377 F.3d 119, 124 (1st Cir. 2004) ('a reviewing court customarily defers to the trial judge, whose intimate knowledge of the nuances of the underlying case uniquely positions him to construct a condign award') (internal citation omitted). Accordingly, we will disturb such an award only if the district court has manifestly abused its discretion or made a mistake of law. *Id.* at 124. Such an abuse or mistake may occur if a court, in arriving at an award,

ignores a material factor deserving significant weight, relies upon an improper factor, or relies solely upon proper factors but mistakenly weighs those factors. *Coutin,* 124 F.3d at 336.

Here, the district court did not abuse its discretion. First, although the jury only awarded the plaintiffs' aggregate damages of $17,980 based primarily on the § 1983 claims, the Supreme Court has rejected "the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers." *City of Riverside* v. *Rivera,* 477 U.S. 561, 574 (1986) (plurality opinion). Further, while the trial result is a "preeminent consideration in the fee-adjustment process," *Coutin,* 124 F.3d at 338, – all the plaintiffs were equally unsuccessful as to one of their four shared claims – we have stressed that a plaintiff's claim-by-claim success is only one of the factors to be considered when examining the results obtained. *Id.* Also significant is "the societal importance of the right which has been vindicated." *Id.* The district court emphasized that the plaintiffs were victorious on the civil rights claim that "propelled this litigation for more than five years."

Finally, although excessive or unproductive time spent is not compensable, *see, e.g., Lipsett* v. *Blanco,* 975 F.2d 934, 937 (1st Cir. 1992), in this case the district court "carefully examined" Hodgson's claims of excessiveness and found the plaintiffs' fee schedule, prepared according to the accepted lodestar method, to be justified. In the end, we see no reason to

question the district court's judgment on this factor, or any of the other factors, and accordingly affirm the fee award.

For the foregoing reasons, the judgment is ***affirmed.***

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 06-1191

DAVID DAVIGNON, DAVID GOUVEIA,
DAVID MILLER, EDWARD MORIS, JR.,
and THOMAS PRESBY,

Plaintiffs, Appellees,

v.

THOMAS M. HODGSON, Individually
and as Bristol County Sheriff,

Defendant, Appellant.

ERRATA SHEET

(Entered May 15, 2008)

The opinion of this Court issued on April 24, 2008 is amended as follows:

Page 14, lines 11-12: the citation to *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle,* 429 U.S. 274, 281-282 (1977) is deleted.

Page 28, line 11: the following sentence is inserted as part of the quoted language, following 'decision.': "Of course, the employer must have the opportunity to prove that it would have made the same decision regardless of the protected expression."

Page 28, line 15: "thus" is inserted between 'is' and 'ordinarily'.

Page 29, line 8: The citation to *Id.* is amended to read "*Curran,* 509 F.3d at 45; *O'Connor,* 994 F.2d at 913."

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 06-1191

DAVID DAVIGNON, DAVID GOUVEIA,
DAVID MILLER, EDWARD MORIS, JR.,
and THOMAS PRESBY,

Plaintiffs, Appellees,

v.

THOMAS M. HODGSON, Individually
and as Bristol County Sheriff,

Defendant, Appellant.

ERRATA SHEET

(Entered June 30, 2008)

The opinion of this Court issued on April 24, 2008 is amended as follows:

On page 34, line 15, insert after " . . . matter of substantive law." the text below as new footnote number 10 and renumber all subsequent footnotes accordingly.

The cases Hodgson cites in his reply brief discuss generally the principle of *judicial* deference to decisions made within a public safety organization. They do not stand for the proposition that a court should instruct a jury regarding this principle. The reason

for this is obvious: juries should not be engaging in *Pickering* balancing in the first place.

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 06-1191

DAVID DAVIGNON, DAVID GOUVEIA,
DAVID MILLER, EDWARD MORIS, JR.,
and THOMAS PRESBY,

Plaintiffs, Appellees,

v.

THOMAS M. HODGSON, Individually
and as Bristol County Sheriff,

Defendant, Appellant.

JUDGMENT

Entered: April 24, 2008

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Mr. Pfaff, Mr. Knuuttila, Mr. Zoubaidoulline, Mr. Franco, Mr. Weintruab [sic], Mr. Turco, Mr.

Beauregard, Mr. Knapp, Mr. Prusinowski, Mr. Smith, Mr. Corrigan, Mr. Louison, Mr. Assad & Ms. Riedel.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID DAVIGNON, et al
Plaintiff(s)

v.

CIVIL ACTION NO.
01-10615-MEL

THOMAS M. DODGSON [sic], **Individually and in his capacity as Bristol County Sheriff**
Defendant(s)

AMENDED
JUDGMENT IN A CIVIL CASE

LASKER,S.D.J.

X **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

In regarding plaintiff David Davignon

David Davignon recover of the defendant Thomas Hodgson, In his official capacity as Bristol County Sheriff, the sum of: $ 6.480.00 [sic] **with interest, thereon at the rate of 12% as provided**

by law, in the amount of $ 3,581.13, and his costs of action. The jury also found for the plaintiff David Davignon under the Massachusetts Civil Rights Act that the defendant Thomas Hodgson wrongfully interfered with the plaintiff's employment with the Bristol County Sheriff's Office.

SARAH A. THORNTON
CLERK OF COURT

Dated: February 24, 2006 By /s/ George H. Howarth
Deputy Clerk

NOTE: The post judgment interest rate effective this date is ____%

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID DAVIGNON, et al
Plaintiff(s)

v.

CIVIL ACTION NO.
01-10615-MEL

THOMAS M. DODGSON [sic], **Individually and in his capacity as Bristol County Sheriff**
Defendant(s)

AMENDED
JUDGMENT IN A CIVIL CASE

LASKER,S.D.J.

X **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

In regarding plaintiff David Gouveia

David Gouveia recover of the defendant Thomas Hodgson, In his official capacity as Bristol County Sheriff, the sum of: $4,320.00 with interest, thereon at the rate of 12% as provided by law, in the

amount of $ 2,347/66. [sic] **and his costs of action. The jury also found for the plaintiff David Gouveia under the Massachusetts Civil Rights Act that the defendant Thomas Hodgson wrongfully interfered with the plaintiff's employment with the Bristol County Sheriff's Office.**

SARAH A. THORNTON
CLERK OF COURT

Dated: February 24, 2006 By /s/ George H. Howarth
Deputy Clerk

NOTE: The post judgment interest rate effective this date is ___%

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID DAVIGNON, et al
Plaintiff(s)

v.

CIVIL ACTION NO.
01-10615-MEL

THOMAS M. DODGSON [sic], **Individually and in his capacity as Bristol County Sheriff**
Defendant(s)

AMENDED
JUDGMENT IN A CIVIL CASE

LASKER,S.D.J.

X **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

In regarding plaintiff David Miller

David Miller recover of the defendant Thomas Hodgson, In his official capacity as Bristol County Sheriff, the sum of: $4,320.00 with interest, thereon at the rate of 12% as provided by law, in the

amount of $ 2,347/66. [sic] **and his costs of action. The jury also found for the plaintiff David Miller under the Massachusetts Civil Rights Act that the defendant Thomas Hodgson wrongfully interfered with the plaintiff's employment with the Bristol County Sheriff's Office.**

SARAH A. THORNTON
CLERK OF COURT

Dated: February 24, 2006 By /s/ George H. Howarth
Deputy Clerk

NOTE: The post judgment interest rate effective this date is ____%

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID DAVIGNON, et al
Plaintiff(s)

v.

CIVIL ACTION NO.
01-10615-MEL

THOMAS M. DODGSON [sic], **Individually and in his capacity as Bristol County Sheriff**
Defendant(s)

AMENDED
JUDGMENT IN A CIVIL CASE

LASKER,S.D.J.

X **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

In regarding plaintiff Edward Morris

Edward Morris recover of the defendant Thomas Hodgson, In his official capacity as Bristol County Sheriff, the sum of: $ 1,44.00 [sic] **with interest, thereon at the rate of 12% as provided by law, in**

the amount of $ 181.67, and his costs of action. The jury also found for the plaintiff Edward Morris under the Massachusetts Civil Rights Act that the defendant Thomas Hodgson interfered with, or attempt to interfere with plaintiff's legal rights by means of threats, intimidation, or coercion.

SARAH A. THORNTON
CLERK OF COURT

Dated: February 24, 2006 By /s/ George H. Howarth
Deputy Clerk

NOTE: The post judgment interest rate effective this date is ____%

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID DAVIGNON, DAVID GOUVEIA, DAVID MILLER, EDWARD MORRIS, JR., and THOMAS PRESBY, Plaintiffs,	)	
v.	)	01-CV-10615-MEL
THOMAS HODGSON, Individually and as Bristol County Sheriff, Defendant.	)	

MEMORANDUM AND ORDER

LASKER, D.J.

The Defendant, having previously suspended Plaintiffs David Davignon, David Gouveia, David Miller, Edward Morris, Jr., and Thomas Presby on charges of having improperly discussed union activities on company time, and the jury in this case having rendered a verdict determining that such actions violated the Plaintiffs' constitutional rights of free speech, it is hereby ordered that the Defendant, Bristol County Sheriff Thomas Hodgson, shall within twenty (20) days of the date of this Permanent Injunction:

1. Rescind the suspensions imposed on the Plaintiffs in November and December 2000, and

expunge all references to such suspensions from the Plaintiffs' respective personnel files; and

2. Reinstate the Plaintiffs to their bidding and seniority rights held before the suspensions imposed in November and December 2000.

It is so ordered.

Dated: February 22, 2006
Boston, Massachusetts

/s/ Morris E. Lasker
U.S.D.J.

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID DAVIGNON, et al
Plaintiff(s)

v.

CIVIL ACTION NO.
01-10615-MEL

THOMAS M. DODGSON [sic], **Individually and in his capacity as Bristol County Sheriff**
Defendant(s)

JUDGMENT IN A CIVIL CASE

LASKER,S.D.J.

X **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

In regarding Thomas Presby

Thomas Presby recover of the defendant Thomas Hodgson in his official capacity as Bristol County Sheriff, the sum of $ 1,440.00, with interest, thereon at the rate of $ 12% as provided by law

in the amount of $ 181.67, and his costs of action.

SARAH A. THORNTON,
– CLERK

Dated: November 21, 2005 /s/ George H. Howarth
(By) Deputy Clerk

NOTE: The post judgment interest rate effective this date is 4.32 %.

APPENDIX K

United States Court of Appeals
For the First Circuit

No. 06-1191

DAVID DAVIGNON, DAVID GOUVEIA, DAVID MILLER, EDWARD MORIS, JR., and THOMAS PRESBY, Plaintiffs, Appellees,

v.

THOMAS M. HODGSON, Individually and as Bristol County Sheriff, Defendant, Appellant.

Before
Lynch, *Chief Judge*,[1]
Torruella and Boudin, *Circuit Judges*,
Stahl, *Senior Circuit Judge*,
Lipez and Howard, *Circuit Judges*.

ORDER OF COURT
Entered: June 30, 2008

Pursuant to First Circuit Internal Operating Procedure X(C), the Appellant Thomas M. Hodgson's petition for rehearing en banc has also been treated as a petition for rehearing before the original panel.

---

[1] Judge Lynch is recused and did not participate in the disposition of this matter.

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
/s/ Richard Cushing Donovan, Clerk

cc: Mr. Pfaff, Mr. Knuuttila, Mr. Zoubaidoulline, Mr. Franco, Mr. Weintruab [sic], Mr. Turco, Mr. Beauregard, Mr. Knapp, Mr. Prusinowski, Mr. Smith, Mr. Corrigan, Mr. Louison, Mr. Assad & Ms. Riedel.

No. 08-427

Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

THOMAS M. HODGSON, Individually and as BRISTOL COUNTY SHERIFF,

Petitioner,

v.

DAVID DAVIGNON, DAVID GOUVEIA, DAVID MILLER, EDWARD MORRIS, JR., and THOMAS PRESBY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILIP N. BEAUREGARD
Counsel of Record

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioner fails to present an issue, based on the trial record, worthy of consideration by this Court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
REASONS FOR DENYING WRIT	5
I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN THE SEVENTH AND EIGHTH CIRCUITS ON THE ISSUE OF "DEFERENCE"	6
II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN THE SEVENTH AND EIGHTH CIRCUITS ON THE ISSUE OF "POTENTIAL DISRUPTION"	12
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.M.B.H. & Co. Kg., 295 F.3d 50 (1st Cir. 2002) 4

Connick v. Myers, 461 U.S. 138 (1983) 13, 15

Guilloty Perez v. Pierluisi, 339 F.3d 43 (1st Cir. 2003) 11

Jordan v. Carter, 428 F.3d 67 (1st Cir. 2005) 11

Knowlton v. Greenwood Indep. School District, 957 F.2d 1172 (5th Cir. 1992) 8

Kokkinis v. Ivkovich, 185 F.3d 840 (7th Cir. 1999) 6, 9, 12

Pickering v. Board of Education, 391 U.S. 563 (1968) 5, 7, 8, 11, 12

Shands v. City of Kennett, 993 F.2d 1337 (8th Cir. 1993) 6, 9

U.S. v. McGill, 953 F.2d 10 (1st Cir. 1992) 4

Waters v. Churchill, 511 U.S. 661 (1994) 15

Williams v. Seniff, 342 F.3d 774 (7th Cir. 2003) 6

STATUTES AND RULES

42 U.S.C. sec. 1983 16

Supreme Court Rules 42(2) and 43(7) 16

STATEMENT OF CASE

Respondents refer to the First Circuit's description of the relevant facts. App., p. 3-11. Notably, the First Circuit found:

> At trial, conversations between plaintiffs and four officers were highlighted. There was no dispute that the conversations were brief, with estimates ranging from approximately 10 to 45 seconds. App., p. 5.
>
> Testimony and investigative reports reveal that when the plaintiffs approached other officers they did so in a civil, non-threatening manner. App., p. 24.
>
> Neither the plaintiffs nor the officers with whom they spoke testified that the conversations distracted any of them from their work, or otherwise endangered staff or inmates. App., p. 6.
>
> Here, Hodgson had strong evidence indicating the plaintiffs' speech was not disruptive. App., p. 21.
>
> [T]he timing of the suspensions is suspect. When Hodgson suspended the five active union members, he had already demonstrated significant frustration with the union, indulging in an outburst during one negotiation session in particular. App., p. 26.
>
> Further, although Hodgson at one point testified that it was a violation to be doing anything other than working in the facility, he later said that officers were permitted to talk

> about non-union related topics such as upcoming parades, sports, and other small talk subjects. App., p. 11.
>
> Additionally, Hodgson's own actions and pattern of enforcement further undermine his claim of legitimate motives. Although asserting that discussion of union matters is particularly divisive and poses a serious risk of disruption, Hodgson used roll call to personally discuss these same union matters. Relatedly, if Hodgson was so concerned that any non-work focused speech would create such serious distractions and risks, we think it *more than curious* that he would allow employees to discuss things such as parades and sports without punishment. App., p. 26 (emphasis added).

In his statement of case, Petitioner ventures far outside the First Circuit's recitation of the found facts and relies instead on his own self-serving testimony at trial. Petitioner's version of the facts was rejected by the jury and the trial judge. In addition, the First Circuit scrutinized the trial record and expressly found no support for Petitioner's view of the case.

The critical facts, adopted by the jury and the trial judge, and cited in the First Circuit's decision, are manifestly different:

> Although expressing valid interests, the defendant has not in our view demonstrated how the plaintiffs' speech here created harm or increased risks. There was no evidence of actual disruption, despite the fact that the

> plaintiffs spoke at work and during work hours. App., p. 23.
>
> In any event, the record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers. App., p. 24.
>
> If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, we find not even the specter of such harm. App., p. 25.
>
> In this case, there is ample evidence that Hodgson suspended the plaintiffs not out of a legitimate concern that their speech compromised safety at the correctional facilities but because of their pro-union activity. App., p. 25-26.
>
> At trial, the plaintiffs discredited the theory that Hodgson acted because the plaintiffs' speech posed the potential for disruption. App., p. 35.

Petitioner also mischaracterizes the trial court's rulings on two requested jury instructions. Petition, p. 7-8.

Petitioner argues that, in declining to give the requested "deference" instruction, "the trial judge stated his belief that the 'deference' rule did not apply to employment decisions." Petition, p. 8. Not so. The trial judge did not state a belief either way. He merely

declined to give the instruction as requested because Petitioner failed to cite precedent holding that deference should be afforded to the *employment* decisions of prison officials, as opposed to decisions affecting inmates. App., p. 33. The First Circuit found no error because of Petitioner's failure to provide legal support for his request. App., p. 33. *See Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.M.B.H. & Co. Kg.*, 295 F.3d 50 (1st Cir. 2002) (where party fails to make reasonable effort to argue claim by not "supplying pertinent authorities or accounting for their lack," issue is not preserved for appeal).

Petitioner also argues that, in declining to give the requested "potential disruption" instruction, the trial judge adopted the view that Petitioner had to prove actual disruption. Petition, p. 8. Again, not so. The trial judge declined to give the requested instruction because the issue was sufficiently addressed in his charge. App., p. 33. The First Circuit ruled that the requested instruction was "correct as a matter of substantive law," but concluded that "this instruction was substantially incorporated into the charge." App., p. 33, quoting *U.S. v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992) ("so long as the charge sufficiently conveys the defendant's theory, it need not parrot the exact language that the defendant proffers").[1]

---

[1] The First Circuit also held that, even if the failure to give the instruction was error, the error was harmless. App., p. 34-35. The court wrote:

(Continued on following page)

In any event, as discussed *infra*, the First Circuit properly ruled that the issues of "deference" and "potential disruption" should be determined by the court, and not the jury, as part of the *Pickering* balancing test. App., p. 52-53.

REASONS FOR DENYING WRIT

Petitioner advances two flawed arguments. He argues that the First Circuit's decision conflicts with holdings in the Seventh and Eighth Circuits on the issues of a) "deference" to the employment decisions of law enforcement agencies and b) "potential disruption." Petition, p. 12-16, 18. He also argues that the First Circuit's view of "potential disruption" raises an important public policy concern that "requires a clear ruling by this Court that a public safety official need not await actual disruption before regulating speech in the workplace." Petition, p. 16.

Petitioner's arguments have no merit. The First Circuit's decision does not conflict with holdings in

---

Here, even if the district court had specifically used the phrase "potential disruptiveness" in the instruction, it is unlikely that the jury would have reached a different conclusion. At trial, the plaintiffs discredited the theory that Hodgson acted because the plaintiffs' speech posed the potential for disruption. And further, as discussed above, the jury almost certainly considered the potential for disruption given the language of the actual instruction. App., p. 35.

the Seventh and Eighth Circuits, but is entirely consistent with them. In addition, the issue of "potential disruption" has already been settled by this Court. The First Circuit applied correct legal principles to the facts actually found in this case.

I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN THE SEVENTH AND EIGHTH CIRCUITS ON THE ISSUE OF "DEFERENCE."

Respondents do not quarrel with Petitioner's claims that law enforcement agencies are unique among governmental agencies in the need to maintain order and discipline, Petition, p. 16-17, that law enforcement agencies must "receive greater latitude in disciplining employees than some other public entities, such as universities," Petition, p. 17, and that the employment decisions of law enforcement agencies are entitled to "deference." Petition, p. 12-15. However, Petitioner misstates the record when he says that the First Circuit's decision conflicts with decisions of the Seventh and Eighth Circuits, holding that the employment decisions of law enforcement agencies are entitled to judicial deference. Petition, p. 14-15, citing *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993), *Kokkinis v. Ivkovich*, 185 F.3d 840 (7th Cir. 1999), and *Williams v. Seniff*, 342 F.3d 774 (7th Cir. 2003). What Petitioner conspicuously refuses to acknowledge is that the First Circuit explicitly applied these legal principles in its decision.

The First Circuit properly discussed the framework for review of public employee First Amendment claims. First, the court must determine whether the employee spoke as a citizen on matters of public concern; second, the employee's interest as a citizen in commenting upon those matters must be balanced against the employer's interest in the efficient performance of its public service;[2] and third, if the balance weighs in favor of the employee, it must be determined whether the protected speech was a substantial or motivating factor in the employer's disciplinary action. App., p. 13-14.

Here, the trial court ruled that the balance of interests weighed in favor of Respondents. It then submitted the balancing test to the jury. Petition, p. 7. Petitioner argues that the trial court rejected the deference standard by not instructing the jury as follows: "In addition, judicial review of prison officials' actions, especially those taken to preserve institutional security, is very limited. Courts reviewing the administration of prisons and jails must give appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement." Petition, p. 8, 15-16. The First Circuit ruled that the trial judge's refusal to give that specific instruction was proper in light of Petitioner's failure to provide

---

[2] This balancing test was set forth by this Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), and is commonly referred to as the *Pickering* balancing test.

legal support for his request. Petition, p. 13, citing App., p. 33. In addition, the First Circuit stated:

> The cases Hodgson cites in his reply brief [the same cases cited in the petition here] discuss generally the principle of *judicial* deference to decisions made within a public safety organization. They do not stand for the proposition that a court should instruct a jury regarding this principle. The reason for this is obvious: juries should not be engaging in *Pickering* balancing in the first place. App., p. 53 (emphasis in original).

The balancing test is an issue for the court. Here, the trial court performed the balancing test before submitting it to the jury, concluding that the balance of the competing interests weighed in favor of Respondents. App., p. 14. That determination was reviewed *de novo* on appeal. App., p. 14, citing *Knowlton v. Greenwood Indep. School District*, 957 F.2d 1172, 1177-78 (5th Cir. 1992) (reviewing balancing question *de novo* despite fact that district court sent question to jury). Therefore, the issue is not whether the trial court's refusal to provide the requested instruction was proper, or whether the trial court applied correct legal standards in performing the balancing test. The issue is whether the First Circuit applied correct legal principles in reviewing the trial court's determination *de novo*.

Petitioner argues that the First Circuit followed the trial court in rejecting a deference standard in the context of public employee First Amendment claims.

Petition, p. 16 ("Yet, both the trial court and the First Circuit rejected the deference concepts . . . "). Far from rejecting the deference concept, the First Circuit applied the same deference analysis used by the Seventh and Eighth Circuits. Those Circuits hold that deference applies to judicial review of a law enforcement agency's disciplinary decisions on two levels: a) to the employer's determinations as to the existence of actual or potential disruption caused by employee speech and b) to the employer's disciplinary response itself. *See Shands*, 993 F.2d at 1344-45, and *Kokkinis*, 185 F.3d at 845-46.

First, the First Circuit acknowledged that, in operating correctional facilities, the Petitioner has a greater interest in maintaining discipline and harmony in the workplace:

> In emphasizing the government's interests, both Hodgson and amici raise concerns that are not insubstantial. In addition to contending that the plaintiffs' speech caused actual disruption, Hodgson testified about the more general need to assert control over correctional officers' speech. He spent considerable time detailing the pressurized, high-stakes environment in which the officers work and relating how, in particular, if plaintiffs' speech was left unchecked, it could have potentially disrupted that environment, creating risks to the safety of employees and inmates alike. Maintaining discipline and harmony in the workplace is a valid governmental interest . . . *The need for discipline,*

> *maintenance of harmony among co-workers, and close working relationships requiring personal loyalty and confidence is greater in the context of law enforcement.* Putting aside practical distinctions between correctional facilities and police departments, the importance of safety within correctional facilities cannot casually be dismissed. App., p. 22-23 (emphasis added) (internal citations omitted).

Next, the First Circuit concluded that, even in the face of this greater interest, Petitioner's decisions were not reasonable and not supported by the evidence:

> *Although expressing valid interests*, the defendant has not in our view demonstrated how the plaintiffs' speech here created harm or increased risks. There was no evidence of actual disruption, despite the fact that the plaintiffs spoke at work and during work hours. App., p. 23 (emphasis added).
>
> In any event, the record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers. App., p. 24.
>
> If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, we find not even the specter of such harm. App., p. 25.

> In this case, there is ample evidence that Hodgson suspended the plaintiffs not out of a legitimate concern that their speech compromised safety at the correctional facilities but because of their pro-union activity. App., p. 25-26.

There can be no question that the First Circuit recognized, identified, and applied correct legal principles to its *de novo* analysis of the *Pickering* balancing test. Petitioner's difficulty is that his facts do not support his law.

Petitioner claims that the First Circuit had not addressed the issue before and treated the issue as a matter of first impression. Petition, p. 13. This case was *not* one of first impression. In its prior decisions, the First Circuit had recognized and applied a deference based standard for law enforcement agencies. App., p. 23, citing *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 53-54 (1st Cir. 2003) ("The importance of discipline, maintenance of harmony among co-workers, and close working relationships requiring personal loyalty and confidence is greater in the context of a law enforcement agency . . . than it might be in another type of government agency. Therefore, *courts must be sensitive to the needs of law enforcement agencies in disciplining an employee whose expressive conduct interferes with these interests.*") (emphasis added) (internal citations omitted). *See also Jordan v. Carter*, 428 F.3d 67, 74 (1st Cir. 2005) ("in examining [employer's] side of the balance, we acknowledge that the government's interest is particularly acute in the

context of law enforcement, where there is a heightened interest in maintaining discipline and harmony among employees") (internal quote omitted), citing *inter alia* the Seventh Circuit's decision in *Kokkinis*, 185 F.3d at 845.

II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS IN THE SEVENTH AND EIGHTH CIRCUITS ON THE ISSUE OF "POTENTIAL DISRUPTION."

Petitioner makes essentially the same argument on the "potential disruption" issue. Petitioner argues that a public employer may regulate employee speech not only when it causes *actual disruption* in the workplace, but also when it has the *potential for disruption*. Petition, p. 16-19. Petitioner states that the trial court rejected the "potential disruption" principle by not instructing the jury as follows: "Even absent the special deference given to prison administrators, potential disruptiveness can outweigh the employee's free speech interests." Petition, p. 8, 18. The First Circuit found no error because "this instruction was substantially incorporated into the charge to the jury." App., p. 33. In addition, the First Circuit noted that the issue of potential disruption is addressed in the context of the *Pickering* balancing test, and "juries should not be engaging in *Pickering* balancing in the first place." App., p. 53. The issue is for the court, and the First Circuit reviewed it *de novo* on appeal. App., p. 24-25. Therefore, the

question is whether the First Circuit applied correct legal principles when performing the balancing *de novo*.

Petitioner argues that the First Circuit, "while not rejecting these substantive principles outright," in effect adopted a standard different than "potential disruption," which a) conflicts with decisions of the Seventh and Eighth Circuits, and b) "fails to recognize the important policy considerations associated with workplace speech and behavior within the confines of a prison." Petition, p. 18. Contrary to Petitioner's claim that the First Circuit *in effect* adopted the wrong standard, the First Circuit's decision is specific on this subject:

> Against the scant evidence of actual disruption, Hodgson *reasonably asserts* that a government employer is entitled to consider not only whether the employee's speech actually disrupted the work place environment but also *whether the speech had the potential to disrupt*. He argues that the plaintiffs' speech threatened to "disintegrate" working relationships by creating a division between officers sympathetic to the union and those who were not. *Indeed, an employer may consider a speech's potential to disrupt. See Connick*, 461 U.S. at 152 ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"). App., p. 24 (emphasis added).

It is utterly frivolous for Petitioner to argue that the First Circuit required "actual disruption," when the decision clearly states that "an employer may consider a speech's potential to disrupt." App., p. 24. Applying this principle to the trial record, the First Circuit concluded *de novo*:

> [T]he record is even thinner in support of Hodgson's position that the plaintiffs' speech threatened to disrupt the harmony among workers . . . If the plaintiffs' speech hinted at burgeoning signs of hostility toward officers unsympathetic to the union, Hodgson's concerns about potential disruption to workplace harmony would have substance. After an exhaustive review of the record, however, *we find not even the specter of such harm*. The *mere incantation* of the phrase "internal harmony in the workplace" is not enough to carry the day. App., p. 24-25 (emphasis added) (internal quotes and citations omitted).

Petitioner's "incantation" is not supported by the trial record. There is no merit to Petitioner's argument that the First Circuit's standard was either incorrect or in conflict with the Seventh and Eighth Circuits.

Petitioner finally claims that "public policy requires a clear ruling by this Court" that public safety employers are allowed to regulate employee speech based on its potential to cause disruption, without having to wait for "the potentially disastrous consequences of actual disruption." Petition, p. 11, 16-17. That issue, however, has long been conclusively

decided by this Court. *See Connick v. Myers*, 461 U.S. 138, 152 (1983) ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"). *See also Waters v. Churchill*, 511 U.S. 661, 662 (1994) ("as a matter of law, the potential disruptiveness of [employee's] speech would have rendered it unprotected under the *Connick* test"). The First Circuit expressly referred to these principles, even quoting this Court's language from *Connick* and *Waters*. App., p. 19-20, 24. The First Circuit's decision accords with this Court's established views on "potential disruption."

Petitioner continues to assert unfounded and rejected facts to obtain further judicial review of his wrongful conduct. The trial record simply does not support his arguments.

CONCLUSION

The petition for writ of certiorari should be denied. Respondents request attorney's fees and costs on appeal in connection with their claim under 42 U.S.C. sec. 1983. Respondents also request attorney's fees and costs, including double costs, for Petitioner's filing of a frivolous petition under Supreme Court Rules 42(2) and 43(7).

Respectfully submitted,

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